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Good News Club v. Milford Central School: A Critical Analysis of the Establishment Clause as Applied to Public Education

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GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL:

A CRITICAL ANALYSIS OF THE ESTABLISHMENT CLAUSE AS APPLIED TO PUBLIC EDUCATION.

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I. INTRODUCTION

The right to Freedom of Speech[1], contained within the First Amendment, allows every person to express personal beliefs on government property characterized as a public forum.[2] However, the right to speak in a public forum is a qualified right.[3] As a guarantee that citizens will have an equal opportunity to speak

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1 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech).

2 NORMAN REDLICH, ET AL., UNDERSTANDING CONSTITUTIONAL LAW 431 (2d ed. 1999); *see* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (defining the various types of public forums). *See generally* Stewart v. Dist. of Columbia Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988) (explaining "the traditional public forum is a place that historically has been devoted to the free exchange of views; streets and parks are quintessential examples of traditional public fora"); Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1256-63 (1995) (examining historical interpretation by Supreme Court of public forum doctrine).

3 *Perry Educ. Ass'n*, 460 U.S. at 44 (stating "the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue"); *see* REDLICH, ET AL., *supra* note 2, at 431 (arguing the "right of access is not absolute" and "[a]n unlimited right of access to the public forum would jeopardize the First Amendment rights of everyone."); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001) (stating "[w]hen the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program"); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (asserting "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government").

and be heard, the government may place limited restrictions on a speaker's access to a public forum.[4]

The Establishment Clause, also contained within the First Amendment, precludes the government from establishing any one religion.[5] The two primary theories of Establishment clause jurisprudence disagree on the degree of state/religion involvement that will result in a violation of this clause.[6] Those who support the strict separation theory believe that government should have absolutely no entanglement with religion.[7] Those who support some links between government and religion are believers of the government accommodation theory.[8]

This all becomes much more confusing when the Court is faced with a situation of *religious* speech in a public forum.

The Court's first ruling in the arena of public education came in 1981 with *Widmar v. Vincent*.[9] In *Widmar*, the Court held that

[4] *Perry Educ. Ass'n*, 460 U.S. at 45 (stressing "the state may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"); *see* REDLICH, ET AL., *supra* note 2, at 431 (stating "[t]he Constitution permits the government to place limited time, place and manner restrictions on the right to speak in a public forum to ensure that those who wish to speak can be heard"); *see also* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (remarking "reasonable 'time, place and manner' regulations on speech may be necessary to further significant governmental interests, and are permitted"). *See generally* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799-800 (noting "[e]ven protected speech is not equally permissible in all places and at all times.").

[5] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion"); *see* Lee v. Weisman, 505 U.S. 577, 587 (1991) (explaining "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so'") (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[6] REDLICH, ET AL., *supra* note 2, at 506 (discussing the "competing approaches to interpretation" of the Establishment Clause). *Compare* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15-16 (1947) (construing Establishment Clause to require complete separation of church and state), *with* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (discussing the role religion plays in society and reasoning the complete separation of church and state is hostile to religion).

[7] *See* Reynolds v. U.S., 98 U.S. 145, 164 (1878) (asserting the First Amendment erected a "wall of separation between church and state"); *see also Everson*, 330 U.S. at 18 (arguing there cannot be the "slightest breach" of church and state).

[8] *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (commenting "[s]ome relationship between government and religious organizations is inevitable"); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 212-13 (1963) (discussing the role religion has played in our nation's history); *Zorach*, 343 U.S. at 313 (remarking on religious references in our society); Glenn S. Gordon, Note, *Lynch v. Donnelly: Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185, 187 (1985) (explaining "[a]ccomodationists . . . argue that the framers of the establishment clause meant only to prevent the government from favoring one sect over another and did not intend to forbid neutral government support for religion as a whole").

[9] Widmar v. Vincent, 454 U.S. 263, 264-65 (1981) (presenting "the question whether a

the University of Missouri at Kansas City had created a forum for use by student groups, and thus could not exclude from its facilities a student group that was religious in nature.[10] The Court applied the analysis used in *Widmar* to public high schools by upholding the constitutionality of the Equal Access Act in *Board of Education v. Mergens*.[11] Recently, in *Good News Club v. Milford Central School*, the Court held that Milford violated the free speech rights of the Good News Club, a Christian organization for children ages six to twelve, when it refused the Club entry to the school after hours.[12] By denying the Club access to the school's facilities because of the Club's religious nature,

state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion"); *see* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 522-25 (2000) (noting *Widmar* was the first of the "Education Cases" finding viewpoint discrimination in a case "involving access to school facilities or student fees").

[10] *See Widmar*, 454 U.S. at 277 (holding "[h]aving created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards."); *see also* Dena S. Davis, *Religious Clubs in the Public Schools: What Happened after Mergens?*, 64 ALB. L. REV. 225, 225 (2000) (stating "[i]n Widmar *v. Vincent*, the Supreme Court held that a public university in the State of Missouri was required to allow religiously based student groups the same access to school facilities as it afforded to other student groups"); Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations: Jones v. Clear Creek Independent School District*, 47 ARK. L. REV. 653, 662 (1994) (commenting "in *Widmar v. Vincent* the Supreme Court held that a university had to allow religious student groups the same access to its facilities that it had accorded other student groups").

[11] Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (holding "the Equal Access Act does not on its face contravene the Establishment Clause"); *see* REDLICH, ET AL., *supra* note 2, at 464 (commenting that in *Mergens*, "[t]he Court's analysis paralleled that of Widmar."); *Davis*, *supra* note 10, at 225 (noting "[t]he Equal Access Act, upheld by the Supreme Court in Board of Education v. Mergens, requires public secondary schools to allow access to religiously based student groups on the same basis as other student clubs"); *see also* Howard M. Baik, Note, *Chandler v. James: A Student's Right of Prayer in Public Schools*, 15 BYU J. PUB. L. 243, 255 (2001) (stating "[t]he Supreme Court, in *Westside Community Schools v. Mergens*, later upheld the constitutionality of the Act and ruled it to be within the bounds of the Establishment Clause").

[12] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (holding "[w]hen Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment."); *see also* Richard Collin Mangrum, *Good News Club v. Milford Central School: Teaching Morality from a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV 1023, 1026-29 (2002) (explaining Justice Thomas' majority decision); David H. Sundwall, Note, *Good News Club v. Milford Central School: Can Religion Mix With Public Schools?*, 4 J. L. FAM. STUD. 183, 183 (2002) (noting "[t]he U.S. Supreme Court held in a six to three decision that a public school violated the free speech rights of a religious club by barring its use of the school's facilities.").

Milford discriminated based solely on viewpoint.[13]

The purpose of this note is to examine the Supreme Court's continued practice of granting little consideration to the Establishment Clause when examining religious speech in education. Supreme Court holdings in this area seem to suggest that as long as the speech in question survives Free Speech analysis, it must be constitutional. In its attempt to protect the viewpoint of religious speakers, the Court has begun to ignore the role that the Establishment Clause plays in protecting the fundamental rights of not only religious organizations and their members, but also the rights of the students who attend class in these forums.[14] These students have the right to be free from feeling pressured into joining a religious group or religious activity.[15]

Part II of this comment begins with a discussion of Freedom of Speech in public places, and continues with a discussion of the Establishment Clause. Part II then concludes with a discussion of the additional concerns and issues raised by both the Free Speech Clause and the Establishment Clause when addressing religious speech in public education. Part III provides an in-depth look at the *Good News* decision. Part IV suggests that the Court has taken another step toward eradicating the separation between church and state. Part V analyzes the possibility that

[13] *Good News Club*, 533 U.S. at 108 (concluding that Club's teaching of moral lessons from Christian perspective is speech with religious viewpoint, therefore school's exclusion constituted unconstitutional viewpoint discrimination); *see also* Mangrum, supra note 12, at 1027 (explaining that "the Court found that Milford's exclusion of the Good News Club constituted 'viewpoint discrimination'"); Sundwall, *supra* note 12, at 186 (noting "the Court held that the Milford policy banning religious organizations was unconstitutional viewpoint discrimination, which was not justified by relying on the Establishment Clause").

[14] *See generally Good News Club*, 533 U.S. at 142-45 (Souter, J., dissenting) (distinguishing *Good News Club* from *Lamb's Chapel*, *Rosenburger*, and *Widmar*, based on timing and format of challenged activity); Chris Brown, Note, *Good News? Supreme Court Overlooks the Impressionability of Elementary-Aged Students in Finding a Parental Permission Slip Sufficient to Avoid an Establishment Clause Violation*, 27 DAYTON L. REV. 269, 290 (2002) (arguing Court's holding injures students by eradicating protection from religious coercion). *But see* Mangrum, *supra* note 12, at 1074 (concluding "the Court's opinion may provide a foundation for a more coherent free exercise and establishment jurisprudence").

[15] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (stating "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"); *see also* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O, Connor, J., concurring) (arguing government endorsement of religion sends message to nonadherents that they are disfavored); *Everson*, 330 U.S. at 15 (explaining government "can neither force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion").

the Court's decision in *Good News* could actually injure organizations such as the Good News Club, more than it has helped them.

II. ESTABLISHING A RIGHT OF RELIGIOUS SPEECH IN PUBLIC EDUCATION.

Free Speech in a public forum is a complicated right.[16] The right to religious speech is even more complicated because Establishment Clause concerns are now thrown into the analysis.[17] The right to express one's religious viewpoint in the forum of public education has developed through numerous Supreme Court decisions.[18]

Freedom of Speech in Public Places

Government property is split into various classes that confer differing levels of rights to the speaker dependent on the nature of the property.[19] *Perry Education Ass'n v. Perry Local Educators' Ass'n*[20] is the lead opinion on public forums.[21] The

16 *See* Sheri M. Danz, Note, *A Nonpublic Forum or a Brutal Bureaucracy? Advocates' Claims of Access to Welfare Center Waiting Rooms*, 75 N.Y.U. L. REV. 1004, 1031 (2000) (discussing complications that have developed in public forum analysis since *Perry*); C. Thomas Dienes, Commentary, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 111-15 (1986) (explaining development of public forum analysis); *see also* Philip L. Hirschhorn, Note, *Noncommercial Door-To-Door Solicitation and The Proper Standard of Review For Municipal Time, Place, and Manner Restrictions*, 55 FORDHAM L. REV. 1139, 1146-49 (1987) (clarifying complications relating to public forum analysis).

17 REDLICH, ET AL., *supra* note 2, at 463 (commenting "[t]he additional concerns and issues raised by the Establishment Clause make religious speech in public places more complicated than other speech.")

18 *See infra* text accompanying notes 20-154.

19 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (asserting there are three categories of public property); REDLICH, ET AL., *supra* note 2, at 446 (discussing the "modern approach" to speech in public places); *see* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132-33 (1981) (noting restrictions and classifications that are placed on public forums); *see also* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535 (1980) (stating the three theories behind public forum analysis).

20 460 U.S. 37 (1983).

21 *Perry Educ. Ass'n*, 460 U.S. at 44 (stating "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."). *See generally* Martha H. Good, Comment, *The Expansion of Exclusive Privileges for Public Sector Unions: A Threat to First Amendment Rights?*, 53 U. CIN. L. REV. 781, 788-92 (1984) (explaining Supreme Court's decision and rationale in *Perry*); Pamela A. Schechter, Note, *Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood*

Perry decision held that public property is characterized into three different types of forums:

1. the traditional public forum;[22]

2. the public forum by designation (also known as the limited public forum);[23] and

3. the non-public forum.[24]

The traditional public forum includes "places which by long tradition or by government fiat have been devoted to assembly and debate" such as streets and parks.[25] If a State intends to exclude speech based on its content, "it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[26] The State may limit expression in a traditional public forum with time, place and manner restrictions "which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication."[27]

The second type of forum is the public forum by designation,[28] also known as the limited public forum, where the government has opened access to the forum for the discussion of limited topics or for use only by certain groups.[29] "Although a State is not

School District, 55 FORDHAM L. REV. 241, 244 (1986) (noting that decision in *Perry* established current law on public forums).

22 *Perry Educ. Ass'n*, 460 U.S. at 45 (declaring "places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.").

23 *Id.* (pronouncing "[a] second category consists of public property which the State has opened for use by the public as a place for expressive activity.").

24 *Id.* at 46 (proclaiming "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards.").

25 *Id.* at 45 (stating "streets and parks... 'have immemorially been held in trust for the use of the public and...have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'") (quoting Hague v. Comm. For Indus. Org., 307 U.S. 496, 515 (1939)).

26 *Perry Educ. Ass'n*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

27 *Perry Educ. Ass'n*, 460 U.S. at 45.

28 *Id.* (noting public forum by designation "consists of public property which the state has opened for use by public as place of expressive activity."); *see also* Edward J. Neveril, Comment, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185, 1194 (1996) (listing examples of specific designated public forums).

29 *Perry Educ. Ass'n*, 460 U.S. at 46, n.7 (declaring "a public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.");

required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[30]

The third type of forum, the non-public forum, involves property "which is not by tradition or designation a forum for public communication."[31] If all property owned by the government were accessible for public expression, the constant interruptions would prevent governmental offices from functioning effectively.[32] The government can restrict the content of speech in accordance with the "intended purposes" of the forum if such restriction is reasonable and not an attempt to suppress speech based on viewpoint.[33]

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,[34] the Court further defined the characteristics of a public forum by designation, stating, "[t]he government does not create

see also Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 BYU EDUC. & L.J. 87, 101-07 (1999) (suggesting certain groups which may fit into limited public forum). *See generally* Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 281 (1999) (defining limited public forum to only include certain types of speech).

30 *Perry Educ. Ass'n*, 460 U.S. at 46; *see* Gary S. Newberry, Note, *Constitutional Law: International Society for Krishna Consciousness, Inc. v. Lee: Is the Public Forum a Closed Category?*, 46 OKLA. L. REV. 155, 157-60 (1993) (stating traditional and limited public forums are held to strict standard of review); *see also* Susan Jill Rice, Note, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561, 567-69 (1988) (discussing relationship between traditional and limited public forums require they be held to same standard of review).

31 *See Perry Educ. Ass'n*, 460 U.S. at 46 (recognizing "the 'First Amendment does not guarantee access to property simply because it is owned or controlled by government.") (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)). *See generally* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-78 (1998) (defining nonpublic forums and applicable restrictions).

32 *Perry Educ. Ass'n*, 460 U.S. at 53 (finding when government property is not dedicated to open communication government may restrict its use to only those who are participating in government's official interest); REDLICH, ET AL., *supra* note 2, at 448 (commenting "[w]hen the government acted in its business capacity to serve the public, it needed leeway to operate efficiently."); *see also* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting) (explaining some "outsiders" may be allowed to use nonpublic forum for expressive activity when they are participants in government's official business); Greer v. Spock, 424 U.S. 828, 838 (1976) (declaring "the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum).

33 *Perry Educ. Ass'n*, 460 U.S. at 46 (asserting "[i]n addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."); *see also* Casarez, *supra* note 9, at 521-23 (explaining viewpoint discrimination is only checkpoint to restrictions placed on nonpublic forums).

34 473 U.S. 788 (1985).

a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[35] Therefore, in determining whether a public forum exists, the Court stated it would look to policy, practice, and the nature of the property as an indication of whether the government intended to designate the property as a public forum.[36] The Court will not hold that the government has created a public forum, "in the face of clear evidence of a contrary intent" or "when the nature of the property is inconsistent with expressive activity."[37]

The Establishment Clause

The Court has developed various approaches to Establishment Clause interpretation.[38] The two most prevalent approaches are the strict separation theory and the government accommodation stance.[39] The rationale of the strict separation theory was first

[35] *Cornelius,* 473 U.S. at 802; *see also Ark. Educ. Television Comm'n* 523 U.S. at 677 (quoting development of public forum test stated in *Cornelius*); Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679-80 (1992) (stressing importance of government action in order to create public forum).

[36] [T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

Cornelius, 473 U.S. at 802; Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences if They Do Not*, 28 AKRON L. REV. 187, 202 (1995) (stating schools may only be conceived as public forums if it was policy of school officials to create them as such); *see also* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 344 (5th Cir. 2001) (discussing importance of nature of property in determining whether it was intended to become public forum).

[37] *See Cornelius*, 473 U.S. at 803; Summum v. City of Ogden, 297 F. 3d 995, 1002 (10th Cir. 2002) (quoting *Cornelius* requirement of clear government intent to establish public forum); *see also* David A. Stoll, Comment, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271, 1273-74 (1992) (commenting on standard that when government has expressed a contrary intent, the Court will not find a public forum has been created and asserting "[t]his standard effectively eviscerates the First Amendment, because the government is empowered to ensure that little property will be categorized as a public forum").

[38] REDLICH, ET AL., *supra* note 2, at 506 (discussing the "competing approaches to interpretation of the religion clauses."). *See* Gonzales v. North Township of Lake County, 4 F.3d 1412, 1421 (7th Cir. 1993) (noting varying approaches courts have taken); David Felsen, Comment, *Developments in Approaches To Establishment Clause Analysis: Consistency For the Future*, 38 AM. U.L. REV. 395, 397 (1989) (discussing three doctrinal approaches). *See generally* D.G.L., Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127, 130-43 (1985) (analyzing different approaches Court has taken in Establishment Clause cases).

[39] *See* Felsen, *supra* note 38, at 397-410 (discussing historical development of strict

introduced by the writings of Thomas Jefferson and James Madison.[40] In an 1802 letter to the Danbury Baptist Association, Jefferson expressed his belief that there should be a "wall of separation" between church and state.[41] Madison believed the words of the First Amendment Religion Clauses to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[42]

The Supreme Court adopted the strict separation theory in *Everson v. Board of Education*.[43] The Court found the

separation and accommodation theory); Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause* 95 YALE L.J. 1237, 1239-40 (1986) (describing different approaches to meaning of Establishment Clause). *See generally* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting Court's reluctance to adopt one general Establishment Clause approach).

40 *See* Felsen, *supra* note 38, at 397-400 (commenting that the view of Jefferson and Madison was "radical departure" from then existing views of separation); *see also* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 590-91 (1998) (stating Supreme Court has relied upon strict separation theory advocated by Madison and Jefferson); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1101 (1995) (describing societal changes that allowed views of Madison and Jefferson to become prominent).

41 *See* David Steinberg, *Tearing Down the Wall Separating Church and State*, SAN DIEGO UNION-TRIB., June 14, 2001, at B-9 & B-13 (arguing "Jefferson's letter in no way suggests that government may not aid religious groups. Instead, Jefferson was writing to assure members of a small religious group that they would not face persecution on account of their religion."); *see also* James E.M. Craig, Comment, *"In God We Trust," Unless We Are a Public Elementary School: Making a Case For Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 532 (2000) (noting Jefferson did not participate in drafting of Bill of Rights because he was out of country at time). *See generally* Shahin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503, 507 (1990) (stating strict separation is based upon Jefferson's concept of "wall of separation").

42 Wallace v. Jaffree, 472 U.S. 38, 95 (quoting 1 Annals of Cong. 424, 730). *Compare* Wallace, 472 U.S. at 98 (1985) (Rehnquist, J., dissenting) (referring to Madison as "undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights," but noting that it "was James Madison speaking as an advocate of sensible legislative compromise," and not as a "zealous believer in the necessity of the Religion Clauses" because from "glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789," it is clear "that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects," however he "did not see it as requiring neutrality on the part of government between religion and irreligion"), *and* Craig, *supra* note 41, at 522 (arguing Madison viewed First Amendment as prohibition on establishment of national religion and prohibition on religious discrimination), *with* Rezai, *supra* note 41, at 507 (noting Madison advocated separation between spiritual and secular spheres).

43 330 U.S. 1, 16 (1947) (applying strict separation standards to statute at issue); *see* Theologos Verginis, *ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? "With God All Things Are Possible"*, 34 AKRON L. REV. 741, 743 (2001) (discussing *Everson* doctrine of "wall of separation"); *see also* John Gay, Note, *Bowen v. Kendrick: Establishing a New Relationship Between Church and State*, 38 AM. U. L. REV. 953, 958 (1989) (stating Supreme Court did not specifically address Establishment Clause until *Everson*).

Establishment Clause required a strict separation of church and state.[44] Writing for the majority, Justice Black stated that the Establishment Clause "was intended to erect 'a wall of separation between church and state.'"[45] The use of the "wall of separation" language indicated that Black based his opinion on Jefferson's interpretation of the Establishment Clause.[46]

Five years later, the accommodationist approach was introduced in *Zorach v. Clauson*.[47] Justice Douglas reasoned that adherence to the strict separation theory would lead to unnecessary hostility between the state and religion and disrupt

> [44] The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson, 330 U.S. at 15-16; *see* Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 212 (1948) (reaffirming rationale of Everson that the First Amendment has created a wall, "which must be kept high and impregnable").

[45] *Everson*, 330 U.S. at 16, 18 (quoting Jefferson's "wall of separation" language and stating additionally "[t]hat wall must be kept high and impregnable"); *see* Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause,* 58 ALB. L. REV. 543, 546 (1994) (interpreting Black's decision as having been influenced by writings of Madison and Jefferson). S*ee generally* Koenick v. Felton, 190 F.3d 259, 264 (4th Cir. 1999) (quoting *Everson* "wall of separation" approach and noting difficulty of applying approach).

[46] *See* Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 9-10 (1998) (finding "the *Everson* Court rested its interpretation in the views expounded by Jefferson and Madison" because both were influential in having the Establishment Clause inserted into the Constitution); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 104 (1996) (arguing *Everson* Court based its decision on opinions of Madison and Jefferson); Joseph P. Viteritti, *Panel Three: A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question*, 57 N.Y.U. ANN. SURV. AM. L. 89, 104 (2000) (arguing wall language used by court was metaphor from Jefferson); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1704 (1992) (stating *Everson* Court wholly relied on Madison and Jefferson to interpret Establishment Clause).

[47] 343 U.S. 306 (1952); *see* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970) (quoting *Clauson* principle that First Amendment does not require total separation); *see also* Felsen, *supra* note 38, at 405 (reasoning accommodation theory arose out of necessity for new doctrine).

many of our society's traditions.[48] The government must be neutral in its approach to religious activity.[49]

These opposing theories are important to this discussion because they provide the foundation of how the Court views the role of religious speech in public education.

Through the 1970's the view of strict separation theory could primarily be found in school funding cases.[50] The first decision was the notable case of *Lemon v. Kurtzman*.[51] *Lemon* involved Pennsylvania and Rhode Island statutes that provided state aid in the form of supplemental salaries to schoolteachers in religious elementary and secondary schools.[52] The *Lemon* Court

48 *Clauson*, 343 U.S. at 312-13 (stating "[t]he First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."); *see also* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1536 (1995) (arguing complete separation of church and state standard is too rigid standard and has therefore been rejected); Rezai, *supra* note 41, at 511 (noting rationale behind accommodationist theory is that complete government neutrality towards religion may negatively affect rights granted under Free Exercise Clause). *See generally* REDLICH, ET AL., *supra* note 2, at 508-09 (discussing *Zorach* decision).

49 *See Clauson*, 343 U.S. at 315 (commenting, "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."). *See generally* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 743-45 (1994) (Scalia, J., dissenting) (discussing examples of permissive accommodation without Establishment Clause challenges); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985) (stating "our cases have consistently recognized that [providing for the secular education of schoolchildren] cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious"), *overruled by* Agostini v. Felton, 521 U.S. 203, 232-34 (1997) (clarifying neutrality is acceptable, but not excessive fostering of religious worship).

50 *See* Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1000 (2002) (commenting, "in the latter half of the twentieth century, the Supreme Court frequently used the Establishment Clause to invalidate programs that utilized government funds to assist religiously affiliated schools, even though these programs proved beneficial to both the students and the nation"); Viteritti, *supra* note 46, at 103 (opining "[t]he First Amendment jurisprudence of the Burger Court was anchored by two decisions that strict separationists regularly cite in their briefs against aid to religious schools"). *But see Walz*, 397 U.S. at 670 (concluding "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement").

51 Lemon v. Kurtzman, 403 U.S. 602 (1971). *But see* Felsen, *supra* note 38, at 408 (claiming *Lemon* "test . . dismantled Jefferson's and Madison's 'wall of separation'"). *See generally* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795 (1973) (acknowledging domino effect of fiscally deficient private schools that must increase tuition, forcing parents to turn to public schools, thereby exacerbating problems of public education, and resulting in diminished support for parochial schools, however, declining to find that this outweighs relevant provisions and purposes of First Amendment that safeguard "separation of Church from State and have been regarded from the beginning as among the most cherished features of our constitutional system").

52 *Lemon*, 403 U.S. at 606-25 (explaining that under both statutes aid was provided to

established a three-prong test for the purpose of analyzing Establishment Clause cases: 1) "the statute must have a secular legislative purpose"; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) "the statute must not foster 'an excessive entanglement with religion.'"[53] This test is still applicable to Establishment Clause jurisprudence, but the Court does not always apply it when considering an Establishment Clause challenge.

Various justices of the Court have criticized the utility of the *Lemon* test. Justice Scalia is one of its most outspoken critics, advocating for the cessation of its use.[54] He has refused to apply

private educational institutions that gave religious instruction, however Pennsylvania statute furnished financial assistance to non-public elementary and secondary schools, whereas Rhode Island statute limited assistance to teachers in private elementary schools only, yet holding both statutes unconstitutional because "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government"). *But see Walz*, 397 U.S. at 676-78 (pointing out that aid in form of property tax exemptions for houses of worship does confer financial benefit, but it is allowed because its application is neutral); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243-44 (1968) (reaching same result as *Everson*, and holding New York statute constitutionally valid because fact that free books may make it more likely that some children choose to attend sectarian school "does not alone demonstrate an unconstitutional degree of support for a religious institution").

53 *Lemon*, 403 U.S. at 612-13 (finding there are "three main 'evils' against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'") (quoting Walz v. Tax Commission, 397 U.S. 664, 668 (1970)). *See generally* Zelman v. Simmons-Harris, 122 S.Ct. 2460, 2476 (2002) (O'Connor, J., concurring) (asserting majority's decision is consistent with prior Establishment Clause jurisprudence, and noting "[a] central tool in our analysis of cases in this area has been the *Lemon* test"); Sch. Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 222-23 (1963) (comparing and contrasting Free Exercise Clause and Establishment Clause, and policies underlying each).

54 Unlike Justice O'Connor, however, I would not replace *Lemon* with nothing, and let the case law "evolve" into a series of situation specific rules (government speech on religious topics, government benefits to particular groups, etc.) unconstrained by any "rigid influence[.]" The problem with (and the allure of) *Lemon* has not been that it is "rigid," but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire. To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle.

See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist., 512 U.S. at 750-51 (Scalia, J., dissenting) (citations omitted) (rejecting Justice O'Connor's suggestion, in *Kiryas Joel*, that Establishment Clause tests would be less problematic to apply if restructured to cover narrower subject matter); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (likening Lemon to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District" and joining "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering

Lemon because he believes it is too arbitrary:[55] the Court has used it when it desires to invalidate an activity it forbids,[56] but when the Court wishes to uphold an activity forbidden by the test, it is simply disregarded.[57]

This strict separation view of aid to religious institutions continued throughout the 1970's.[58] In *P.E.A.R.L. v. Nyquist*,[59] the Court invalidated, under the primary effect prong of *Lemon*, a program involving three forms of aid: direct grants to nonpublic schools for maintaining and repairing facilities; a plan providing tuition reimbursement to parents below a certain income level; and tax relief for those parents who did not qualify for the reimbursement.[60] *Levitt v. P.E.A.R.L.*[61] invalidated a New York law that reimbursed private schools for administering and reporting the scores of state required tests; some of the tests were prepared by the state, but others were prepared by teachers in nonpublic schools.[62] The statute failed Establishment Clause

shapes its intermittent use has produced."); Lee v. Weisman, 505 U.S. 577, 638-44 (1992) (Scalia, J., dissenting) (gloating that "[t]he Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision") (citation omitted).

55 *Lamb's Chapel*, 508 U.S. at 399 (stating "[t]he secret of the Lemon test's survival, I think, is that it is so easy to kill."). *See* Marc C. Rahdert, *A Jurisprudence of Hope; Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 73 (1998) (concluding Court's "notable avoidance of *Lemon* in several of its recent decisions strongly suggests that the test is currently held in low esteem . . . [and that] Chief Justice Rehnquist and Justices Scalia and Thomas have argued that *Lemon* should be either overruled or abandoned"). *See generally Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 720 (O'Connor J., concurring) (stating *Lemon* test is so easy to disregard as evidenced by instances in which test has not been applied) (citing Lynch v. Donnelly, 465 U.S. 668 (1984)); Tilton v. Richardson, 403 U.S. 672, 677-78 (1971) (proffering that determination must be made in light of all previous decisions with regard to Establishment Clause).

56 *Lamb's Chapel*, 508 U.S. at 399 (arguing "[w]hen we wish to strike down a practice it forbids, we invoke it").

57 *Lamb's Chapel*, 508 U.S. at 399 (arguing "when we wish to uphold a practice it forbids, we ignore it entirely"). *See generally* Frank, *supra* note 50, at 1009-11 (identifying inconsistencies with application of *Lemon* test).

58 *See generally* Inke Muehlohoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 413-25 (2000) (discussing Court's use of strict separation theory and *Lemon* test).

59 413 U.S. 756 (1973).

60 P.E.A.R.L. v. Nyquist, 413 U.S. 756, 774-794 (1973) (finding "[s]pecial tax benefits... cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."); *see also* Viteritti, *supra* note 46, at 103 (characterizing Court's decision, that when aid is given to religious schools it is equivalent to giving money to religious institutions, as "remarkable leap in logic").

61 Levitt v. P.E.A.R.L., 413 U.S. 472 (1973).

62 *See Levitt*, 413 U.S. at 482 (holding lump-sum payments to private schools as violation of Establishment Clause because amount of payment could not be calculated in

analysis because it provided no guarantee that the state required tests would be administered in a manner free of religious instruction.[63] *Meek v. Pittenger*,[64] invalidated two Pennsylvania statutes granting extensive educational aid in the form of "auxiliary services," (such as psychological services, speech and hearing therapy, testing and related services for exceptional, remedial and educationally disadvantaged students) textbooks, and "instructional materials."[65] Justice Stewart found that the state would need to continuously watch over the nonpublic schools to ensure that these funds went to strictly secular purposes, and that such continuous involvement would constitute an excessive entanglement of the church and state.[66]

In the 1980's the doctrine shifted as the justices began to apply the accommodationist theory.[67] The first decision came in *P.E.A.R.L. v. Regan*,[68] which upheld a statute enacted by the New York Legislature to fix the constitutional invalidity of the statute struck down in *Levitt*. The new statute did not allow for

way that would only reimburse secular costs).

63 *See Levitt*, at 480 (commenting "[w]e cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.").

64 Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

65 *Meek*, 421 U.S. at 354-55 (noting "instructional materials" consist of "periodicals, photographs, maps, charts, sound recordings, films 'or any other printed and published materials of a similar nature.'")

66 *See Meek*, 421 U.S. at 370 (stating the same "excessive entanglement" required of the government in *Lemon* would be required of Pennsylvania in this situation); *see also* Hunt v. McNair, 413 U.S. 734, 743 (1973) (noting "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting"); *cf.* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 766 (1976) (focusing on character of institutions receiving aid in deciding whether institution was able to separate secular and religious functions) (citing Tilton v. Richardson, 403 U.S. 672, 688 (1971)).

67 *See generally* Stanley H. Friedelbaum, *Free Exercise in the States: Belief, Conduct and Judicial Benchmarks*, 63 ALB. L. REV. 1059, 1061 (2000) (noting revival of accommodation theory caused Supreme Court justices to return to broad interpretations of Free Exercise Clause); Viteritti, *supra* note 46, at 103-08 (discussing First Amendment decisions in later years of Burger Court and discussing First Amendment decisions of Rehnquist Court).

68 *Regan*, 444 U.S. 646; *see also* Viteritti, *supra* note 46, at 105 (suggesting this decision is first case that led to destruction of high wall of separation between church and state). *See generally* Note, *The Constitutionality of Tax Relief for Parents of Children Attending Public and Nonpublic Schools*, 67 MINN. L. REV. 793, 802 (1983) (opining *Regan* decision indicates Supreme Court's tolerance to "some degree of continuing state involvement with church schools" provided this involvement does not necessitate inspection and assessment by state of religious content of certain educational services).

reimbursement costs of teacher-prepared tests, and provided for audits to ensure that funds were only being used for sectarian purposes.[69] The Court applied the *Lemon* test in *Mueller v. Allen*[70] to uphold a Minnesota statute granting tax deductions to parents for tuition, textbooks, and transportation.[71] The Court found the statute constitutional on three grounds under the primary effect prong of *Lemon*: the deduction was only one of several deductions available under the Minnesota tax code; the statute allowed deductions to all parents, and thus to all children received benefit, not just those attending non-public schools; and the benefits were given directly to the individual parents rather than to the school.[72]

Throughout Establishment Clause jurisprudence, numerous other views, in addition to the competing approaches of strict separation and government accommodation, have been espoused concerning what theory the Court should use to decide these cases.[73] In addition to *Lemon*, a few Justices have developed their own tests on how to analyze the activity.[74] These alternatives acknowledge that religious speech is guaranteed the right of access, while also recognizing the Establishment Clause rights of those in the environment in which the activity is taking place.[75]

69 *See Regan*, 444 U.S. at 659-62 (agreeing with argument that excessive entanglement would not result because it is apparent which services would be reimbursed). *See generally* Jonathan Friedman, *Charitable Choice and the Establishment Clause*, 5 GEO. J. FIGHTING POVERTY 103, 116 (1997) (finding similar statute "blends the secular and sectarian to such an extent that the separate funding of the secular will be difficult to achieve and still more difficult to monitor").

70 Mueller v. Allen, 463 U.S. 388 (1983).

71 *Mueller*, 463 U.S. at 394-403 (applying the *Lemon* test). *But see* Norwood v. Harrison, 413 U.S. 455, 463-64 (1973) (holding "free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves").

72 *See Mueller*, 463 U.S. at 396-402 (noting statute does not have "primary effect of advancing the sectarian aims of the nonpublic schools"); *see also* REDLICH, ET AL., *supra* note 2, at 518 (discussing the Court's focus on the primary effect prong); Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen,* 31 WAYNE L. REV. 157, 167-72 (1984) (discussing *Mueller* decision).

73 *See* Felsen, *supra* note 38, at 398 (discussing pluralism approach); Scott A. Fenton, Comment, *School Voucher Programs: An Idea Whose Time Has Arrived,* 26 CAP. U. L. REV. 645, 649 (1997) (discussing neutrality approach in addition to strict separation theory); Rezai, *supra* note 41, at 506 (naming "flexible accommodation" doctrine).

74 *See* Lee v. Weisman, 505 U.S. 577, 581-99 (1992) (presenting Coercion Test); Wallace v. Jaffree, 472 U.S. 38, 67-84 (1985) (O'Connor, J., dissenting) (improving Endorsement Test); Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring) (presenting Endorsement Test).

75 *See Lee*, 505 U.S. at 590 (considering position of all students when applying Coercion Test); *Lynch*, 465 U.S at 687- 88 (arguing government endorsement or disapproval sends improper message to members of political community).

Justice O'Connor's Endorsement Test

In her concurring opinion in *Lynch v. Donnelly*,[76] Justice O'Connor presented her endorsement test in hopes of clarifying Establishment Clause doctrine.[77] She claimed that the government would violate the Establishment Clause in two ways: 1) "excessive entanglement with religious institutions"[78] and 2) "government endorsement or disapproval of religion."[79] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[80]

Justice O'Connor uses two of the three prongs of the *Lemon* test as the foundation for her endorsement test.[81] She interprets the purpose prong of the *Lemon* test as asking "whether the government intends to convey a message of endorsement or disapproval of religion."[82] She interprets the effects prong as seeking to determine "whether, irrespective of the government's

76 465 U.S. 668 (1984).

77 *See Lynch*, 465 U.S. at 687 (O'Connor, J., concurring) (stating "I write separately to suggest a clarification of our Establishment Clause doctrine."). *But see* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 151 (1992) (opining Justice O'Connor's endorsement test is "in tension with her accommodationist interpretation of the Free Exercise Clause"); Jeremy Speich, Comment, *Santa Fe Independent School District v. Doe: Mapping the Future of Student-Led, Student-Initiated Prayer in Public Schools,* 65 ALB. L. REV. 271, 276 (2001) (stating O'Connor's endorsement test often "overshadows the importance and viability of the *Lemon* test").

78 *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

79 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

80 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring);.

81 *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (noting under the endorsement test "*Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."); *Lynch,* 465 U.S. at 690-92 (O'Connor, J., concurring) (construing *Lemon* test as has having both subjective and objective components); *see also* FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION 48 (Northeastern University Press 1999) (stating Endorsement test is sometimes characterized as being part of *Lemon* test and at other times characterized as separate test).

82 *See Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (discussing purpose prong of *Lemon* test and arguing "the mere existence of some secular purpose" does not satisfy this prong); *see also* Texas Monthly, Inc. v. Bullock, Comptroller of Public Accounts of Texas, 489 U.S. 1, 9 (1989) (citing *Lynch* and noting that requirement of secular legislative purpose for statutes prevents government from supporting single religious belief); Bown v. Gwinnett County Sch. Dist., 895 F. Supp. 1564, 1577 (N.D. Ga. 1995) (commenting the purpose prong "is focussed [sic] on whether there is a primary secular purpose for the statute and not whether any religious purpose can be uncovered").

actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[83] Therefore, according to Justice O'Connor, courts are required, when examining a challenged practice, to inquire whether the government's purpose is to endorse (or disapprove) religion and whether that practice actually conveys such a message of endorsement (or disapproval).[84] She is focusing on the subjective and objective aspects of the practice, addressing both the subjective intent of the speaker and the resultant objective message received by the community.[85]

"The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect."[86] According to Justice O'Connor, church and state will inevitably carry on in the same community, leading to both the integration and conflict of governmental interests with religious interests.[87] A statute may have "an incidental or primary effect of helping or hindering a sectarian belief," though

83 *See Lynch*, 465 U.S. at 690, 691-92 (O'Connor, J., concurring) (noting effects prong has been "properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."); *see also* Good News/Good Sports Club v. Sch. Dist. of Ladue, 28 F.3d 1501, 1508 (8th Cir. 1994) (finding any religious effect that is secondary to secular effect does not render policy as endorsement); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (evaluating considerations of Establishment Clause analysis).

84 *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (discussing objective and subjective functions of *Lemon* inquiry); *see also Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 348 (noting that to recognize actual effect is first step in challenge on Establishment Clause grounds); *Lynch*, 465 U.S at 690 (O'Connor, J., concurring) (concluding subjective element is purpose prong and objective element is effect prong of *Lemon* test).

85 *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (stating "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."); *see also* Ben Ritterspach, Article, *Refusal of Medical Treatment on the Basis of Religion and an Analysis of the Duty to Mitigate Damages Under Free Exercise Jurisprudence*, 25 OHIO N.U.L. REV. 381, 391 (1999) (stating objective aspects will dominate); Kathryn R. Williams, Recent Decision, Capitol Square Review & Advisory Board v. Pinette, *115 S. Ct. 2440 (1995)*, 69 TEMPLE L. REV. 1609, 1618 n.82 (1996) (pointing out disparity in information access among citizens of community mandates that both objective and subjective components be analyzed).

86 *See Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

87 *See Wallace*, 472 U.S. at 69-70, (stating "church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict and combine."); *see also* Bowen v. Kendrick, 487 U.S. 589, 612 (1988) (concluding it is not surprising that Government's secular concerns would either coincide or conflict with those of religious institutions); Marsh v. Chambers, 463 U.S. 783, 810 (1983) (noting not every governmental act which coincides with or conflicts with particular religious belief is, for that reason, Establishment Clause violation).

the legislature had no such intention; "[c]haos would ensue if every such statute were invalid under the Establishment Clause."[88]

Justice Kennedy's Coercion Test

Justice Kennedy applied his own test in *Lee v. Weisman*.[89] In *Lee,* the Court ruled that permitting public school officials to invite members of the clergy to a public high school graduation ceremony, for the purposes of delivering invocation and benedictions, violated the Establishment Clause.[90] "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so.'"[91] He cited to previous decisions recognizing "that prayer exercises in public schools carry a particular risk of indirect coercion," and insisted that students must be protected from that coercion.[92] Justice Kennedy further noted that this concern is most evident in public education, but is not limited to that environment.[93]

The Court found the degree of school involvement in *Lee* clearly evidenced State support of the religious activity and thus those students who objected to the invocation and benediction, were placed in an "untenable position."[94] The direct supervision

88 *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring) (adding "[t]he task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.").

89 505 U.S. 577 (1992) (applying Coercion test, which had been set forth previously in concurring opinions of County of Allegheny v. ACLU, 492 U.S. 573 (1989), and Board of Education v. Mergens, 496 U.S. 226 (1990)).

90 *Lee*, 505 U.S. at 596-99 (stating "the state-imposed character of an invocation and benediction by clergy selected by the school combine to make a prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit."); *see* Doe v. Sch. Bd., 274 F.3d 289, 292 (5th Cir. 2001) (concluding that practicing verbal prayer in public school violated Establishment Clause). *But see* Brown v. Gilmore, 258 F.3d 265, 281 (4th Cir. 2001) (stating moment of silence does not have coercive effect).

91 *Lee*, 505 U.S. at 587 (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

92 *Lee* 505 U.S. at 592 (citing to: Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 207 (1963) (Goldberg, J., concurring)).

93 *Lee*, 505 U.S. at 592 (citing County of Allegheny v. ACLU, 492 U.S. 573, 661(1989)) (Kennedy, J., concurring) (commenting "[t]he concern may not be limited to the context of schools, but it is most pronounced there"). *See generally* Matthew A. Peterson, Note, *The Supreme Court's Coercion Test: Insufficient Constitutional Protection for America's Religious Minorities*, 11 CORNELL J.L. & PUB. POL'Y 245, 249 (2001) (discussing Court's rationale).

94 *Lee*, 505 U.S. at 590 (focusing analysis on position of students: "both those who desired the prayer and she who did not."). *See generally* Jones v. Clear Creek Indep. Sch.

by the school district resulted in public pressure, and peer pressure, on graduating students to join in the invocation and benediction.[95] Justice Kennedy felt that the pressure felt by attending students, "though subtle and indirect, can be as real as overt compulsion."[96]

Consistent with a religious organization's Free Speech rights, Justice Kennedy also recognized that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[97] Yet, his test maintains the Establishment Clause rights of the students by focusing on the message that the religious activity portrays to them.[98]

In the dissent, Justice Scalia criticized the coercion test, referring to it as the "psychological coercion" test.[99] He described the test as "boundless," and therefore easy to manipulate.[100]

Dist., 977 F.2d 963, 970 (5th Cir. 1992) (analyzing government's direct and complete control over issue of graduation prayers as determinative regarding Establishment Clause inquiry).

95 *Lee*, 505 U.S. at 593. *See generally* ACLU v. Black Horse Pike, 84 F.3d 1471, 1480 (3d Cir. 1996) (noting that to require students "to either conform to the model worship commanded by the plurality or absent themselves from graduation and thereby forego one of the most important events in their lives" is improper); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097, 1099 (E.D. Va. 1993) (discussing *Lee* Court's focus on coercive pressure felt by students who did not desire to participate).

96 *Lee*, 505 U.S. at 593. *See generally* Newdow v. U.S. Congress, 292 F.3d 597, 609 (9th Cir. 2002) (stating, "under *Lee*,...even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect"); *Black Horse Pike*, 84 F.3d at 1480 (commenting an objector's attendance at his/her graduation, in effect, gives appearance of participation and further asserting such appearance must be avoided).

97 *Lee*, 505 U.S. at 598; *see also* Craig, *supra* note 41, at 557 (stating Kennedy recognized that sending young and impressionable elementary students message of hostility towards religion could result in country traveling down path of religious intolerance). *See generally* Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (recognizing that religion and Constitution share common background and that government must protect those commonalties in certain circumstances).

98 *Lee*, 505 U.S. at 590 (analyzing issue from the view of both students who desire to participate in prayer and those who do not). *See generally* Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 874-75 (Cal. 1991) (focusing on perceptions of all individuals at school where religious message is broadcast); Myron Schreck, *Balancing the Right to Pray at Graduation and the Responsibility of the Disestablishment,* 68 TEMP. L. REV. 1869, 1873 (1995) (asserting coercion test considers surrounding circumstances of those to be exposed to prayer).

99 *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (criticizing Justice Kennedy's test; "[a]s its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion"); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 650, n.6 (1989) (Stevens, J., concurring in part and dissenting in part) (posturing that Kennedy's coercion test is out of step with precedent). *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 84 (1992) (commenting on Justice Scalia's dissenting opinion in *Lee*).

100 *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). *See generally* David Schimmel,

Finally, he criticized the Justices for having "gone beyond the realm where judges know what they are doing."[101]

Religious Speech in Public Education

Widmar v. Vincent

The first case in which the Court addressed the access rights of religious speech in public education was *Widmar v. Vincent*.[102] The University of Missouri at Kansas City, a state university, had a policy of encouraging the activities of student organizations, and routinely provided facilities for the meetings of registered organizations.[103] In 1977, the University informed the registered religious group Cornerstone that it could no longer conduct its meetings in University buildings.[104] The decision to exclude Cornerstone was based on a regulation that prohibited the use of University property (except chapels), "for purposes of religious worship or religious teaching."[105] Eleven student

Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman, 76 WEST'S EDUC. L. REP. 913, 918 (1992) (exploring views expressed in Justice Scalia's dissent); Sullivan, *supra* note 99, at 84 (commenting on Justice Scalia's dissenting opinion in *Lee*).

101 *Lee*, 505 U.S. at 636 (Scalia, J., dissenting) (arguing majority's citations to psychological research, which have no connection to issue of case, cannot conceal fact that Court has gone beyond scope of its judicial duties). *See generally* Schimmel, *supra* note 100, at 918 (highlighting arguments of Justice Scalia's dissent); Sullivan, *supra* note 99, at 84 (outlining Justice Scalia's dissenting opinion in *Lee*).

102 Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Martha M. McCarthy, *Community Groups Using Public Schools for Religious Meetings: Will It Be Good News?*, 152 WEST'S EDUC. L. REP. 15, 15 (2001) (noting in context of access to a public forum, some commentators regard *Widmar* as the first decision in which religious expression was given equal treatment to secular speech); Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 703 (2001) (identifying *Widmar* as first in line of case law to address rights of private speakers to discuss religion on public property).

103 *See Widmar*, 454 U.S. at 265 (stating the University had given official recognition to over 100 student groups). *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842-43 (1995) (discussing access of facilities provided to university students).

104 *Widmar*, 454 U.S. at 265 (revealing that from 1973 until 1977, Cornerstone had been granted permission to hold its meetings in campus facilities on regular basis); *see also* Bronx Household of Faith v. Bd. of Educ. of N.Y., 226 F. Supp. 2d. 401, 418 (S.D.N.Y. 2002) (discussing University's withdrawal of permission in 1977).

105 4.0314.0107 - No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups . . .The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University

members of Cornerstone, brought suit to challenge the University's regulation, arguing violations of free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments.[106] The Court held that the University created "a forum generally open to student groups," and therefore could not exclude Cornerstone based on the religious content of the group's speech.[107]

Widmar was decided before *Perry*, but discussed what *Perry* would later term the public forum by designation.[108] The University chose to open its facilities for use by all student groups and, by doing so, it assumed the obligation to justify all exclusions and discriminations against constitutional standards:[109] exclusions must be content-neutral and narrowly drawn to achieve the end of a compelling state interest.[110] "The

> facilities. . .
> 4.0314.0108 - Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

Widmar, 454 U.S. at 265, n.3 (listing pertinent regulations adopted by Board of Curators in 1972).

106 *Widmar*, 454 U.S. at 266; *see also Capitol Square Review*, 515 U.S. at 762-63 (identifying legal grounds upon which students made their claims).

107 *Widmar*, 454 U.S. at 2777 (stating "[h]aving created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards."). *See generally Rosenberger*, 515 U.S. at 842 (averring that providing facilities to students to discuss religious subjects does not violate Establishment Clause); Fordham Univ. v. Brown, 856 F. Supp. 684, 702 (D.D.C. 1994) (distinguishing *Widmar* from facts at issue).

108 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing use of University meeting facilities in *Widmar* as example of public forum "which the State has opened for use by the public as a place for expressive activity."); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802-03 (1985) (discussing *Widmar* Court's finding that university had created a public forum); G. Sidney Buchanan, *Toward a Unified Theory of Governmental Power to Regulate Protected Speech*, 18 CONN L. REV. 531, 566 (explaining "a university campus is not a traditional public forum in the same sense as streets, sidewalks, and parks").

109 *See Widmar,* 454 U.S. at 267, n.5 (citing to previous decisions recognizing "that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum"); *see also Rosenberger*, 515 U.S. at 829 (noting that once there is limited public forum, boundaries created by it must be respected); Kriemer v. Bureau of Police, 958 F.2d 1242, 1257 (3d Cir. 1992) (following *Widmar* for principle that opening forum for public use creates obligation to justify regulation of that forum).

110 *See Widmar*, 454 U.S. at 270 (finding "the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); *see also Perry Educ. Ass'n*, 460 U.S. at 45 (revealing that state must show compelling interest in order to regulate public forum).

Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[111]

The University claimed that its compelling interest was maintaining a separation of church and state to avoid a possible violation of the Establishment Clause.[112] The Court agreed that this interest may be deemed compelling, but found that granting equal access to all organizations, whether religious or secular, would be consistent with the prior Establishment Clause cases.[113] To support its argument, the Court conducted a *Lemon* analysis and found the equal access policy was constitutional.[114]

The Court then proceeded to state that the University misunderstood the legal issue of the case.[115] The issue was not whether allowing a religious organization to use public University facilities would result in an Establishment Clause violation.[116] Rather, the constitutional question was whether the

111 *Widmar*, 454 U.S. at 267-68; *Perry Educ. Ass'n*, 460 U.S. at 45 (citing to *Widmar* for principle that state may not enforce certain restrictions, from generally open forum, although state was not required to create such forum).

112 *Widmar*, 454 U.S. at 270 (discussing University's argument that an Establishment Clause violation would result if it allowed religious groups and speakers to use its facilities). *See generally* Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1280 (10th Cir. 1996) (stating "[t]he Supreme Court has made it abundantly clear that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause"); Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1394, n.17 (11th Cir. 1993) (discussing roles of Free Speech Clause and Establishment Clause in public forum analysis).

113 *Widmar*, 454 U.S. at 271 (stating "[w]e agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."); *see also* Rosenberger v. Univ. of Va., 515 U.S. 819, 839 (1995) (noting Court has rejected argument that Establishment Clause justifies denial of free speech to religious speakers in neutral government programs); Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 707 (4th Cir. 1994) (identifying circumstances analogous to those in *Widmar*, and concluding Establishment Clause concerns are not sufficiently compelling to justify content-based discrimination).

114 *See Widmar*, 454 U.S. at 271-74 (finding first two prongs of test to be easily satisfied, and noting "any religious benefit of an open forum at UKMC would be 'incidental' within the meaning of our cases"). *See generally supra* notes 51-57, and accompanying text.

115 *See Widmar*, 454 U.S. at 273 (declaring "[t]he University's argument misconceives the nature of this case."). *See generally* Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999) (noting government must be accorded some leeway when making self-policing decisions regarding employee conduct that involves inevitable tensions between Establishment Clause and Free Exercise Clause); *Chabad-Lubavitch*, 5 F.3d at 1393-95 (discussing substantive overlap and doctrinal tension between Free Speech and Establishment Clause concerns).

116 *Widmar*, 454 U.S. at 273 (asserting "[t]he question is not whether the creation of a religious forum would violate the Establishment Clause."); *see also Chabad-Lubavitch*, 5

University could exclude the organization based on the religious content of its speech.[117] The Court found that any religious benefits gained by Cornerstone through equal access would only be incidental.[118]

The Equal Access Act[119] provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[120]

The constitutionality of the Act was challenged in *Board of Education v. Mergens*.[121] Petitioners, the School Board of Westside High School, argued that allowing public schools to recognize religious activities would result in school endorsement of the religious club and a violation of the Establishment Clause.[122] The Court rejected this argument, using an analysis which paralleled that of *Widmar*.[123] "[T]here is a crucial

F.3d at 1394 n.17 (commenting, in a public forum, an Establishment Clause cannot outweigh Free Speech rights).

117 *See Widmar*, 454 U.S. at 273 (averring "[t]he University has opened its facilities for use by students groups, and the question is whether it can now exclude groups because of the content of their speech."). *See generally Rosenberger*, 515 U.S. at 828 (holding government is prohibited from regulating speech based on content or viewpoint); *Fairfax Covenant Church*, 17 F.3d at 706 (noting state institutions that have created public fora cannot then discriminate against religious organizations without compelling interest narrowly tailored to achieve their aims).

118 *Widmar*, 454 U.S. at 273-74 (providing two reasons to support finding that incidental benefits granted to religion would not violate effect prong of *Lemon*: 1) "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices"; and 2) "the forum is available to a broad class of nonreligious as well as religious speakers"). *See generally Good News/Good Sports Club*, 28 F.3d at 1508 (holding any incidental benefits to religion are secondary to primary secular effect of neutral forum).

119 Equal Access Act, 20 U.S.C. §§ 4071-4074 (2002).

120 Equal Access Act, 20 U.S.C. 4071(a); *see Pope*, 12 F.3d at 1251 (finding defendant school created limited open forum, thereby triggering Equal Access Act). *See generally Ceniceros*, 106 F.3d at 880 (reviewing interpretations of this statute).

121 Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

122 *See Mergens*, 496 U.S. at 247-48 (noting argument of School Board "that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.").

123 *See Mergens*, 496 U.S. at 248 (concluding logic of *Widmar* is also applicable to analysis of Equal Access Act); *see also Ceniceros*, 106 F.3d at 882 (recognizing, in context of Equal Access Act inquiry, Establishment Clause challenges are strikingly similar to

difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[124] The Court found that students in secondary schools possess the maturity to recognize when their school is endorsing a particular religious activity or when the school is merely allowing the practice of the activity on a non-discriminatory basis.[125]

The Court's application of *Widmar* in subsequent decisions regarding religious speech in public education.

Twelve years after *Widmar*, the Court addressed the issue of religious groups using public school facilities after the hours of instruction in *Lamb's Chapel v. Center Moriches Union Free School District*.[126] New York Education Law §414 provides ten specified purposes for which local school boards can adopt reasonable regulations allowing for the use of school property by the community.[127] Meetings for religious purposes are not included within the law.[128]

those in *Widmar*); *cf. Pope*, 12 F.3d at 1255 (rejecting defendant's argument that making exception to state law in order to comply with Equal Access Act would create implication of religious endorsement).

124 *Mergens*, 496 U.S. at 250. *See* generally Ceniceros, 106 F.3d at 882-83 (discussing school district's attempts to distinguish *Mergens* from the facts in issue); Chabad-Lubavitch v. Miller 5 F.3d 1383, 1392 (11th Cir. 1993) (stating, "the failure to censor is not synonymous with endorsement").

125 *See Mergens*, 496 U.S. at 250 (finding "secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."). *See generally Cecineros*, 106 F.3d at 882-83 (rejecting argument that time of meetings, lunchtime versus after-school, would violate the Establishment Clause, on ground that, in either case, students retain their capacity to distinguish between neutrality and endorsement); *cf.* Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 288 (1998) (reasoning "[i]n elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech").

126 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993) (defining issue as whether, in context of applicable state law, there is violation of Free Speech when a church is denied access to school premises).

127 New York Educ. Law § 414 (2002); *see Lamb's Chapel*, 508 U.S. at 386 (reviewing state statute and commenting that School Board issued rules and regulations for use of school property, allowing for only two of ten purposes authorized by § 414: social, civic or recreational uses (Rule 10), and use by political organizations if compliance with § 414 is secured (Rule 8)). *See generally* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692-93 (2d Cir. 1991) (rejecting School District's reliance on § 414 as basis for denying access).

128 New York Educ. Law § 414 (2002); *see Lamb's Chapel*, 508 U.S. at 386 (citing New York Appellate Court opinion, Trietley v. Bd. of Educ. of Buffalo, 65 A.D.2d 1 (1978), that ruled "local boards could not allow student bible clubs to meet on school property

The Lamb's Chapel Church twice applied to the Center Moriches School District for permission to use school facilities to show a six-part film series[129] that would discuss one doctor's "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage."[130] The District denied both requests, stating that the "film does appear to be church related."[131] The Church alleged violations of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, and the Establishment Clause of the First Amendment, and finally, the Equal Protection Clause of the Fourteenth Amendment.[132]

The Court held that the District's refusal to allow the Church to use school facilities to display the film series was a violation of the Freedom of Speech Clause.[133] There was no argument from the District or the State that a film series about child rearing and

because 'religious purposes are not included in the enumerated purposes for which a school may be used under section 414.'"); *see also* Deeper Life Christian Fellowship v. Sobol, 948 F.2d 79, 84 (1991) (finding *Trietley's* construction of § 414 is binding on Second Circuit); *cf.* Full Gospel Tabernacle v. Community Sch. Dist. 27, 979 F.Supp 214, 220 (S.D.N.Y. 1997), *aff'd* 164 F.3d 829 (2d Cir. 1999) (concluding § 414 does not designate school premises as open public forums, but instead creates limited public forum).

129 *See Lamb's Chapel*, 508 U.S. 388, n.3 (noting film series at issue as TURN YOUR HEART TOWARDS HOME, which included six separate films: 1) A FATHER LOOKS BACK; 2) POWER IN PARENTING: THE YOUNG CHILD; 3) POWER IN PARENTING: THE ADOLESCENT; 4) THE FAMILY UNDER FIRE; 5) OVERCOMING A PAINFUL CHILDHOOD; and 6) THE HERITAGE).

130 *Lamb's Chapel*, 508 U.S. at 388; *see also* Bronx Household, 226 F. Supp. 2d at 418-19 (S.D.N.Y. 2002) (commenting on facts, procedure and holding of *Lamb's Chapel*); John S. Stolz, *The Speech and the Establishment Clauses*, 7 SETON HALL CONST. L.J. 1047, 1057 (1997) (explaining *Lamb's Chapel* in context of establishment of religion).

131 *Lamb's Chapel*, 508 U.S. at 388-89 (reviewing School District's responses to applications: In first application, District replied "[t]his film does appear to be church related and therefore your request must be refused," and in response to second application, District described film series as "family oriented movie—from a Christian perspective," again denying application). *See generally* Stolz, *supra* note 130, at 1057-58 (commenting on *Lamb's Chapel* in context of establishment of religion).

132 *See Lamb's Chapel*, 508 U.S. at 389; *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 384 (2d Cir. 1992), *rev'd* 508 U.S. 384 (1993) (stating plaintiff's causes of action); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 770 F. Supp. 91, 93 (E.D.N.Y 1991), *rev'd* 508 U.S. 384 (1993) (announcing plaintiff's basis for lawsuit).

133 [A]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . .or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely on an otherwise includible subject.

See Lamb's Chapel, 508 U.S. at 394 (finding denial of right to show film series, on basis of its religious viewpoint, completely invalid under Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985); *see also* M.G. "Pat" Robertson, *How Much God in the Schools?: Squeezing Religion Out of the Public Square – The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 251 (1995) (stating *Lamb's Chapel's* holding).

family values would not be an allowable use for social or civic purposes.[134] Thus, there was no evidence that permission to show the film series was denied for any reason other than for its religious viewpoint.[135]

The Court quoted *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc*,[136] to state once again that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[137] By finding viewpoint discrimination, the Court did not address which category of public forum the district created.[138] The Court addressed the School District's Establishment Clause concerns, finding those concerns to be groundless.[139] The film was to be exhibited after school hours, open to the public, and the school was not sponsoring the presentation.[140] There was "no realistic danger" that the District would be perceived as endorsing religion, and any benefit gained by the Church would be incidental.[141]

134 *See Lamb's Chapel*, 508 U.S. at 393 (noting "subject matter is not one that the District has placed off limits to any and all speakers."); *see also* Richard M. Paul III & Derek Rose, *The Clash Between the First Amendment and Civil Rights*, 60 MO. L. REV. 889, 899 (1995) (positing film would have been allowed for social or civic purpose).

135 *See Lamb's Chapel*, 508 U.S. at 393-94 (quoting "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)); *see also* Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp. 2d 178, 186 (N.D.N.Y 1998) (stating holding of *Lamb's Chapel* is that religious point of view cannot be suppressed on school grounds when other points of view on subject are permitted); McCarthy, *supra* note 102, at 17 (discussing Court's finding that only religious viewpoints were barred from subject matter: family values and child rearing).

136 473 U.S. 788 (1985).

137 *See Lamb's Chapel*, 508 U.S. at 394 (quoting *Cornelius*, 473 U.S. at 806); *see also* McCarthy, *supra* note 102, at 17 (explaining School District unconstitutionally applied state statute, resulting in discrimination of viewpoint of church members).

138 *See* McCarthy, *supra* note 102, at 18 (asserting "[b]y finding viewpoint discrimination, the Court did not have to elaborate on the nature of the forum created by the government."). *See generally* Summum v. Callaghan, 130 F.3d 906, 917 (10th Cir. 1997) (concluding school district in *Lamb's Chapel* unconstitutionally denied church's right to show film, not because subject of film was impermissible, but because of religious viewpoint from which subject would be taught); Airline Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1159 (7th Cir. 1995) (claiming *Lamb's Chapel* was decided on viewpoint discrimination).

139 *See Lamb's Chapel*, 508 U.S. at 395 (comparing *Lamb's Chapel* to *Widmar* and concluding "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed"). *See generally* Anderson v. Mexican Acad. and Cent. Sch., 186 F. Supp. 2d 193, 208 (N.D.N.Y. 2002) (distinguishing facts at issue from *Lamb's Chapel* and *Good News*).

140 *See Lamb's Chapel*, 508 U.S. at 395 (commenting school had frequently been used for various private purposes).

141 *See Lamb's Chapel*, 508 U.S. at 395 (stating the activity at issue would not violate the Establishment Clause under the three-prong *Lemon* test).

Only two years later, in *Rosenberger v. University of Virginia*,[142] the Court held that the University of Virginia violated the Freedom of Speech Clause when it denied student activity funds to a student-run newspaper because it deemed the newspaper to be a "religious activity."[143] The University had established a limited public forum.[144] The Court recognized it may be essential for the State to restrict use of the forum "for certain groups or for the discussion of certain topics" in order to limit the forum to its intended purpose,[145] however these restrictions must be narrowly drawn to serve the purpose of the forum, and may not discriminate based on viewpoint.[146]

The Court found that the University's denial of funds was viewpoint discrimination.[147] The University had opened its forum for a variety of student activities; religion was never excluded as a subject matter; however, those organizations with religious viewpoints were disfavored.[148] Thus, the Court "observed a distinction between on the one hand, content discrimination, which may be permissible if it preserves the purposes of that

142 Rosenberger v. Univ. of Va., 515 U.S. 819 (1995).

143 *Rosenberger*, 515 U.S. at 827, 836-37 (finding two dangers to First Amendment existed in this case: "[t]he first danger lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea, and if so, for the State to classify them" and "[t]he second, and corollary danger is to speech from the chilling of individual thought and expression."). *See generally* Bd. of Regents v. Southworth, 529 U.S 217, 233 (2000) (discussing rationale of *Rosenberger* that neutrality in student fee program guarantees there would be no impression student newspaper speaks for school).

144 *Rosenberger*, 515 U.S. at 829 (commenting that, though the State chose to create the limited public forum, viewpoint discrimination is still forbidden).

145 *Rosenberger*, 515 U.S. at 829 (recognizing "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"). *See generally* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 354-55 (5th Cir. 2001) (quoting principle of *Rosenberger* that states may be justified in reserving forums for certain groups to discuss certain topics).

146 *See Rosenberger*, 515 U.S. at 829 (recognizing distinction between content discrimination, "which may be permissible if it preserves the purposes of that limited forum," and viewpoint discrimination, "which is presumed impermissible when directed against speech otherwise within the forum's limitations."). *See generally* East Timor Action Network, Inc. v. City of N.Y., F. Supp. 2d 334, 341 (S.D.N.Y. 1999) (noting in a limited public forum, state must narrowly draw its content-based prohibitions).

147 *See Rosenberger*, 515 U.S. at 831 (concluding "viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake."); *see also id.* at 829 (defining "viewpoint discrimination is thus an egregious form of content discrimination"). *See generally* Mangrum, *supra* note 12, at 1027-28 (delineating modern Supreme Court parameters for religious viewpoint discrimination).

148 *See Rosenberger*, 515 U.S. at 831 (commenting "[r]eligion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.").

limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[149]

The Court declared that granting funding to the newspaper would not result in an Establishment Clause violation.[150] The program of funding all organizations ensures neutrality toward religion.[151] Additionally, in order to enforce the challenged regulation, University officials would be required to review student publications for any underlying religious content.[152] "That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[153]

III. GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL DISTRICT[154]

What is the Good News Club?

The Good News Club is a community-based Christian youth organization, intended for children between the ages of six and twelve,[155] which aims to teach family and moral values from a

149 *See Rosenberger*, 515 U.S. at 829-830 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

150 *See id.* at 846 (concluding "[t]here is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."). *See generally* Widmar v. Vincent, 454 U.S. 263, 273 (1981) ("The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech . . . In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion).

151 *Rosenberger*, 515 U.S. at 839 (reiterating principle of prior holdings; "[w]e have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.") (citing Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 704 (1994)). *See generally* Frank, *supra* note 50, at 1040-43 (discussing the rising emphasis on neutrality in Establishment Clause analysis).

152 *See Rosenberger*, 515 U.S. at 845 (asserting "[t]he. viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief.")

153 *Id.* at 845-846. *But see* Marsh v. Chambers, 463 U.S. 783, 809 (1983) (J. Brennan, dissenting) ("It is indeed true that there are certain tensions . . . that have shaped the doctrine of the Establishment Clause, and required us to deviate from an absolute adherence to separation and neutrality. Nevertheless . . . the Establishment Clause gives us no warrant simply to . . . treat an unconstitutional practice as if it were constitutional").

154 533 U.S. 98 (2001).

155 Good News Club v. Milford Central School, 202 F.3d 502, 504 (2000) (explaining

Christian point of view.[156] It is affiliated with Child Evangelism Fellowship (CEF), a Christian missionary organization that provides support and supervision to Good News chapters nationwide.[157]

A typical Club meeting begins with the children reciting a "memory verse" assigned during the previous week's meeting.[158] If the child correctly recites the verse, he/she is given a prize.[159] The meeting then officially opens with a prayer and singing of the Good News Club theme song.[160] The next portion of the meeting involves a "moral or value" lesson based on a particular biblical verse.[161] CEF provides lesson plans for use in conducting Club meetings.[162] The Second Circuit noted that according to the plans, "the 'teaching objective' is that 'the saved child will desire God's best, allowing God to have first place in his life' and the 'main teaching' is to 'give God first place in your life.'"[163] The lesson plan directs the instructor, when discussing the memory verse, to distinguish between those children who are "saved" and those who are "unsaved."[164] If time permits, the group leader will

"[t]he Club takes its name from the 'good news' of Christ's gospel and the 'good news' that salvation is available through belief in Christ."); Good News Club v. Milford Central School, 21 F. Supp. 2d 147, 149 (1998) (commenting that the Good News Club is non-denominational). *See generally* Ashley Myrick, Comment, *How Can the Church Get Fit if the Fifth Circuit Won't Let It Exercise?*, 54 BAYLOR L. REV. 449, 454 (2002) (describing nature of Good News Club).

156 *Good News*, 202 F.3d at 504; *Good News*, 21 F. Supp. at 149 (noting "[t]his support includes providing teaching materials, prayer booklets (the 'Daily Bread'), and training, in return for which the Clubs pay a fee.").

157 *Good News*, 202 F.3d at 504.

158 *Id.*

159 *Id.*

160 *Id.* at 504-505 (explaining "[t]he meeting officially opens with a prayer led by Reverend Stephen Douglas Fournier that gives thanks and entreats God for His blessing on the meeting. The group then sings the Good News Club theme song, the lyrics of which refer to Jesus Christ and are generally 'about ...good news.'").

161 [T]he children are told a Bible story that emphasizes the same moral value that is represented in the day's memory verse. The story concludes with a "challenge and invitation" segment, which challenges the children to live by the value taught in the day's lesson through trust in God and Jesus Christ.

Id. at 505.

162 *Id.* at 505, n.3 (noting the materials from CEF contain an instructional list entitled "How to Lead a Child to Christ", and discussing one specific lesson plan centered around a verse from Ephesians).

163 *Id* .at 505; *see also*, Amy Rager, *"A Pharoah Who Did Not Know Joseph:" Why Faith-Based Social Programs Should Reject Federal Funding*, 70 UMKC L. REV. 385, 397 (2001) (noting the dissenters recognized this invitation to receive Jesus "crossed the line to unprotected speech").

164 The lesson plan in court's record applies the memory verse differently to the "saved" and "unsaved" students when they are asked to recite. The teacher will tell the "saved" children; "if you have believed on the Lord Jesus as your Savior, one of the wisest

share a "missionary story" and then biblical songs, games, and prayer may follow.[165] The meeting lasts approximately one hour.[166]

Milford's Refusal to Allow Good News to Use School Facilities.

In 1992, Milford Central School enacted a policy, pursuant to NY Education Law §414, adopting seven purposes for which the community could use its buildings.[167] Two of the purposes enacted by the District state: 1) "district residents may use the school for 'instruction in any branch of education, learning or the arts'"[168] and, 2) "the school is available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.'"[169]

The Fourniers, sponsors of the local Good News Club, requested permission from Dr. Robert McGruder, superintendent of the Milford Central School District, to hold the Club's weekly meetings after school in the building.[170] Both McGruder and

decisions you can make is to give God first place in your life. Do and say those things that will please Him." The teacher will say to the "unsaved" children; "if you have never believed on Jesus to save you from sin, you can be sure this is the wisest and most important decision you will ever make. You will be given an opportunity later in class today to believe on Jesus." "The emphasis for the 'unsaved' children is the same in all lesson plans; to accept Jesus Christ as their savior." *Good News*, 202 F.3d at 505, n.4. For further discussion of the unequal treatment of the "saved" and "unsaved" children. *See* Gary D. Allison, *Prelude to a Church-State: The Supremes Set the Stage for Faith-Based Initiatives*, 37 TULSA L.J. 111, 175–88 (2001) (providing an in-depth discussion of the Court's decision); Peterson, *supra* note 93, at 259 (outlining events at a club meeting); *Leading Cases*, 115 HARV. L. REV. 396, 398 (2001) (explaining how instructor taught "saved" and "unsaved" children); *The Good News Decision: Opening the School Door to Aggressive Evangelism*, Vol. 54 No. 7 CHURCH & STATE 15, 14 (2001) (showing teaching methods at school).

165 *Good News*, 202 F.3d at 506 (stating a "missionary story", as described by Rev. Fournier, is a "fictitious story that deals with some part of the world where missionary activity is going on" and highlighting that "[a]t various times throughout the meeting, the group may pray for 'CEF missionaries' and to 'receive Jesus as a child's personal Savior.'"). *See generally* Myrick, *supra* note 155, at 455 (explaining any additional meeting time was filled with stories of missionaries or Bible stories); Scott Fallon, *Bible Club Meetings in School Cause a Stir*, THE RECORD, December 13, 2001, at A01 (noting the children heard stories about missionaries).

166 *Good News*, 202 F.3d at 506.

167 N.Y. Educ. Law § 414 (McKinney 2000) (allowing for the adoption of "reasonable regulations for the use of schoolhouses. . ."); *see also Good News*, 533 U.S. at 102 (citing the New York statutory provision and the schools policy enacted pursuant to it).

168 *Good News*, 533 U.S. at 102.

169 *Id.*

170 *Good News*, 533 U.S. at 103 (noting the Fourniers, as residents of the district,

Milford's attorney reviewed the request and determined that "the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself."[171] Soon thereafter the Milford Board of Education adopted a resolution rejecting the Fournier's request.[172]

The Fournier's filed an action under 42 U.S.C. § 1983 alleging that Milford violated its free speech rights under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993.[173] Both the Federal District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit found that the school district did not engage in unconstitutional viewpoint discrimination.[174] The Supreme Court noted a conflict

were entitled to use the building for purposes approved by school officials). *See generally* Peterson, *supra* note 93, at 259 (explaining the petition was denied because the instruction was not moral education but religious instruction); Joan Del Fattore, *'Good News' Makes News*, THE LEGAL INTELLIGENCER, March 27, 2001, at 3 (discussing school officials refusal to allow the club to move meetings to the school); Kate Zernike, *Court to Hear After-School Evangelism Case*, N. Y. TIMES, February 28, 2001, at A1 (specifying the refusal was based on the club's intention of utilizing the school for establishing religion).

171 This was the second rejection McGruder sent to the Club. The Fourniers first request was formally denied by McGruder on the basis that the proposed use of "singing songs, hearing a Bible lesson and memorizing scripture,' was 'the equivalent of religious worship." McGruder believed the Club's activities would violate the community use policy, which prohibits the use of school facilities for religious purposes. When confronted with a letter from the Club's counsel, Milford's attorney requested information giving more detail as to the character of the Club's activities. The Club sent a description of the organization and a set of materials used during a meeting. Based on these materials, the school district once again denied the request. *Good News*, 533 U.S. at 103. For other accounts of the School Board's refusal, *see* Austin W. Bramwell, *Juris Doctores or Doctores Divinitatis: Good News Club v. Milford Central School*, 533 U.S. 98 (2001), 25 HARV. J.L. & PUB. POL'Y 385, 386 (2001) (discussing denial of application to hold meetings); Zernike, *supra* note 170, at A1 (explaining refusal to allow club to use premises).

172 *Good News*, 533 U.S. at 104. *See generally* Bramwell, *supra* note 171, at 386 (discussing the Club's efforts to have meetings held at school).

173 *Good News*, 533 U.S. at 104, n.1 (remarking that the Religious Freedom Restoration Act was held unconstitutional in City of Boerne v. Flores, 521 U.S. 507 (1997), and noting the Club's claim under the Act was dismissed by the District Court). *See generally* Rager, *supra* note 166, at 395 n.91 (noting the Supreme Court had previously ruled the Religious Freedom Restoration Act unconstitutional); Amy D. Smith, *Constitutional Law - Freedom or Religion and Establishment Clause - School Board's Refusal to Allow Religious Groups To Meet in Public School Constitutes Unlawful Viewpoint Discrimination Under First Amendment*, 32 CUMB. L. REV. 463, 464 n.9 (2002) (noting court dismissed the claim under the Restoration of Religious Freedom Act).

174 The District Court found the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is

among the Courts of Appeals as to "whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[175] The Second, Fifth, and Ninth Circuits had held that excluding speech based on its religious nature in a limited public forum did not constitute viewpoint discrimination,[176] while the Eighth and Tenth Circuits had found it to be unconstitutional viewpoint discrimination.[177] The Supreme Court granted certiorari to resolve this conflict.

Majority opinion – Justice Thomas.

The Court notes that *Rosenberger* and *Lamb's Chapel* guide its rationale; finding that the restrictions made in those cases to be indistinguishable from that made by Milford.[178] Milford opened its facilities, a limited public forum, for organizations that "promote the moral and character development of children"[179]

otherwise permitted under the District's use policies" and noted further that the District's decision to deny access was due to "the general subject matter – religious instruction and prayer, and not on particular perspective or viewpoint on a subject otherwise within the forum's limitations." *Good News*, 21 F. Supp. at 154, 160. The Court of Appeals affirmed, finding the Club's activities "[u]nder even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious." *Good News*, 202 F.3d at 510; *Good News*, 533 U.S. at 104–05.

175 *Good News*, 533 U.S. at 105. *See generally* Allison, *supra* note 164, at 190 n.608 (2001) (noting the Supreme Court granted certiorari in order to resolve this conflict); Peterson, *supra* note 93, at 259 (recognizing the split between the Second and the Eighth Circuit).

176 *See* Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 216 (2d Cir. 1997) (holding a school's refusal to permit use of building, a limited public forum, for weekly religious worship services was constitutional); Campbell v. St. Tammany's School Bd., 206 F.3d 482, 487 (5th Cir. 2000) (holding a school's policy denying use of its limited public forum for a "prayer meeting" does not constitute viewpoint discrimination); *Gentala v. Tucson*, 244 F.3d 1065, 1082 (9th Cir. 2001) (en banc) (holding city was correct in belief that "it could not provide funding to 'events in direct support of religious organizations'" or to a specific "Prayer Day" event without violating the Constitution).

177 *See* Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1519 (8th Cir. 1994) (holding a policy closing school facilities to everyone but the Boy Scouts and athletics from 3 to 6 p.m. on school days was unconstitutional); Church on the Rock v. Albuquerque, 84 F.3d 1273, 1279 (10th Cir. 1996) (holding unconstitutional a city's policy "prohibiting sectarian instruction and religious worship at its Senior Centers").

178 *Good News,* 533 U.S. at 106 (finding "Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases...[b]ecause the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum."). *See generally Leading Cases*, *supra* note 164, at 399 (discussing majority's rationale).

179 *Good News*, 533 U.S. at 108 (stating as examples of what the community use policy would allow: "the use of Aesop's Fables to teach children moral values," "a group could sponsor a debate on whether there should be a constitutional amendment to permit public education," and "the Boy Scouts could meet to influence a boy's character, development and spiritual growth").

and the Court found the Club clearly was such an organization.[180] Comparing the Good News Club with the challenged activities in *Lamb's Chapel*, the Court found that the only difference was the manner in which the Good News Club conveyed its message; live storytelling and prayer, as opposed to lessons taught through film.[181] "We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."[182] The Court held that Milford's exclusion constituted impermissible viewpoint discrimination.[183]

Milford raised the argument that its restriction was required to avoid violating the Establishment Clause.[184] In both *Widmar* and *Lamb's Chapel*, the Court rejected similar Establishment Clause defenses because the Court found no threat that the community would perceive an endorsement of religion.[185] The Court found that the Club's activities were indistinguishable to those in *Widmar* and *Lamb's Chapel*, and therefore rejected Milford's argument.[186]

180 *Good News*, 533 U.S. at 108 (arguing it is undisputed the Club teaches children how to be respectful and kind to others, even if this is done in a nonsecular way).

181 *Good News*, 533 U.S. at 109–10 (finding the distinction "inconsequential").

182 Good News Club v. Milford Cent. Sch.,533 U.S. 98, 111 (2001) (citing Judge Jacob's dissent in the Court of Appeals decision); *see also* Good News Club v. Milford Cent. Sch., 202 F.3d 502, 511-15 (2d Cir. 1999) (opining "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters").

183 *Good News*, 533 U.S. at 111 (reaffirming the Court's holdings in *Lamb's Chapel* and *Rosenberger* that excluding speech from a limited public forum that discusses otherwise permissible subjects from a religious viewpoint is unconstitutional); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) (holding University's refusal to pay printing costs for student publication was not supported by Establishment Clause); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 392 (1993) (holding to exclude speech from a limited public forum that discusses otherwise permissible subjects from a religious viewpoint is unconstitutional).

184 *Good News*, 533 U.S. at 112 (stating Milford's argument "that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities.").

185 *Id.* at 113. In *Lamb's Chapel*, the Court believed the community would not perceive school endorsement of religion because "the showing of a film serious would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just church members." *Lamb's Chapel*, 508 U.S. at 395. In *Widmar* the university's facilities were already open to other groups, thus the community would not perceive the state to be endorsing one religious activity. *Good News*, 533 U.S. at 113.

186 The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just

Milford had attempted to distinguish *Lamb's Chapel* and *Widmar* by highlighting that this situation involved elementary school children who would feel coercive pressure to participate.[187] The Court rejected this argument on the basis of five points. First, an important factor when considering an attack based on the Establishment Clause is the program's neutrality towards religion.[188] "For the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'"[189] Second, the community at issue when considering coercive pressure is not the students, but the parents.[190] The Court reasons that because the children cannot attend without first gaining the permission of their parents, the children cannot be coerced.[191] Third, the Court has never held that the use of school premises, outside of school hours, for religious activity is a violation of the Establishment Clause simply because elementary school students might be present.[192] Fourth, young children would not perceive endorsement because they are not allowed to loiter after school, the meetings are not in an elementary classroom, the instructors are not schoolteachers and the children are of varying ages.[193] Fifth, the risk that young children

> to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Good News, 533 U.S. at 113.

187 *Good News*, 533 U.S. at 113.

188 *Id.* at 114 (citing *Rosenberger*, 515 U.S. at 839 and also citing Mitchell v. Helms, 530 U.S. 793 (2000), for the principle that neutrality is "upholding aid that is offered to a broad range of groups or persons without regard to their religion.").

189 *Id.*

190 *Good News*, 533 U.S. at 115 (2001) (stating the parents choose whether their children will attend a club meeting); *cf.* Powell v. Bunn, 185 Ore. App. 334, 364 (2002) (finding young elementary children will not be coerced into joining the Boy Scouts because parental consent is needed, thus the parents are the relevant community).

191 *Good News*, 533 U.S. at 115 (2001) (finding no reasonable argument exists that the parents might be confused as to whether the school is endorsing religion).

192 *Good News*, 533 U.S. at 115-16 (rejecting Milford's argument that *Lee v. Weisman*, 505 U.S. 577 (1992), supports the proposition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools[;]" the difference is that attendance at the graduation exercise in *Lee* was mandatory, and no independent significance had been given to the fact that the event took place on school grounds). *See generally* Lee v. Weisman, 505 U.S. 577, 592 (1992) (explaining the concept of coercion and the risk of coercion).

193 *Good News*, 533 U.S. at 117-18 (2001) (finding the sum of these factors refutes any

would view the Club's exclusion as government hostility towards religion is as great as the risk that the Club's inclusion will be viewed as government endorsement of religion.[194]

Dissent by Justice Stevens

In his dissent, Justice Stevens divides speech into three categories. The first "is religious speech that is simply speech about a particular topic from a religious point of view."[195] The second category "is religious speech that amounts to worship or its equivalent."[196] The third category "is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith."[197] Justice Stevens then posed the question of whether a public school could constitutionally create a limited public forum that only allowed for the first category of religious speech.[198]

Justice Stevens compares the differences between religious viewpoint and religious proselytizing, to the differences between meetings discussing political issues and meetings intended to recruit new members.[199] If a school were to authorize the use of its facilities for the discussion of current events, it could not exclude speakers with unpopular viewpoints.[200] "But must it therefore allow organized political groups – for example, the

argument that students would perceive government endorsement of religion). *But see* Anderson v. Mex. Acad. & Cent. Sch., 186 F. Supp. 2d 193, 208 (N.D.N.Y. 2002) (finding the existence of religious phrases on a main hallway wall would have the capacity to cause young children to perceive some level of endorsement).

194 *Good News*, 533 U.S. at 118 (2001) (arguing "any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement."). *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (identifying the danger of a chilling effect on perception or ideas where a religious exercise is excluded); Healy v. James, 408 U.S. 169, 180 (1972) (explaining the suppression of ideas is dangerous and should be avoided especially in the academic setting).

195 *Good News*, 533 U.S. at 130 (2001) (Stevens, J., dissenting) (noting *Lamb's Chapel* is an example of this category); *see also Lamb's Chapel*, 508 U.S. 384 (1993).

196 *Good News*, 533 U.S. at 130 (2001) (Stevens, J., dissenting) (noting *Widmar* addressed this type of speech); *see also* Widmar v. Vincent, 454 U.S. 263 (1981) (deciding a case on this particular type of speech).

197 *Good News*, 533 U.S. at 130 (2001) (Stevens, J., dissenting).

198 *Id.* (Stevens, J., dissenting) (stating the more general issue is "the constitutionality of a public school's attempt to limit the scope of a public forum it has created").

199 *Id.* (Stevens, J., dissenting).

200 *Id.* (Stevens, J., dissenting) (stating a school "may not exclude people from expressing their views simply because it dislikes their particular political opinions").

Democratic Party, the Libertarian Party, or the Ku Klux Klan – to hold meetings, the principal purpose of which is. . .to recruit others to join their respective groups?"[201] No – "[s]uch recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission."[202] School officials are reasonable in viewing religious meetings that intend to recruit children for members as a similar risk.[203] Just as a school can deny access to a political organization intending to recruit, "so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship."[204]

Justice Stevens argued that Milford created a limited public forum in which its facilities could not be used for "religious purposes," but this does not mean that all speech with a religious viewpoint is excluded.[205] The school's stated purpose was to exclude speech intended to "promote the gospel."[206] The school was attempting to create a public forum in which only the first category of religious speech was allowed, and Justice Stevens believed this to be constitutional as long as it was achieved through neutral methods.[207]

IV. HAS THE COURT TAKEN ANOTHER STEP TOWARD ERADICATING THE SEPARATION BETWEEN CHURCH AND STATE?

Good News is correctly decided on purely Free Speech grounds. However, it seems the Establishment Clause analysis is merely an afterthought.[208] The Court has consistently held that allowing

201 *Id.* (Stevens, J., dissenting).

202 *Id.* (Stevens, J., dissenting) (comparing hypothetical to Lehman v. Shaker Heights, 418 U.S. 298 (1974), which upheld "a city's refusal to allow 'political advertising' on public transportation").

203 *Id.* (Stevens, J., dissenting) (commenting "[s]chool officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk")

204 *Id.* (Stevens, J., dissenting).

205 *Id.* at 132 (citing to testimony of the Milford superintendent, which indicated the community use policy would allow for teaching of theory that involved religious principles).

206 *Id.*

207 *Id.* (acknowledging distinctions among the three categories may be difficult to draw, but they are nonetheless valid).

208 *See* Barry Hankins, *Is the Supreme Court hostile to religion?*, J. CHURCH & STATE, Sept. 22, 2001 at 681 (stating Court "brushed aside" the Establishment Clause

religious speech on public property does not violate the Establishment Clause.[209] However, it appears that this line of decisions has led the Court to give less concern to the issue of Establishment. As long as the speech survives Free Speech analysis, it must be constitutional. The Court is viewing the Establishment Clause as a threat to the religious freedom of those organizations that choose to use public education forums, rather than considering how the Establishment Clause is a protection to the students.[210] By not allowing religious worship to enter the educational setting, students are not pressured into joining the worship, thus maintaining their right of religious choice.[211]

Distinction between religious viewpoint and worship.

As Justice Stevens discussed in his dissent, it is not very difficult to determine the distinction between religious viewpoint and religious worship.[212] Justice Stevens reasoning agrees with that of the U.S. Court of Appeals, 2nd Circuit in *Bronx Household of Faith v. Community School District No. 10*[213] where the court declared that it is not difficult for school officials to make the distinction between religious worship and religious viewpoint.[214]

arguments); Bernard James & Stephen O'Dell, *The 'Good News' Ruling*, NAT'L L.J., Aug. 6, 2001 at C10 (criticizing Court for leaving Establishment Clause issue open); Martin E. Karlinsky, *'Milford Is About Free Speech,'* N.Y.L.J., July 5, 2001 at 2 (characterizing Court's Establishment Clause findings as "purely dicta").

209 *See supra* notes 102-53, 178-94 and accompanying text.

210 *See* Karlinsky, *supra* note 208 ("The Establishment Clause is not a barrier to religion, rather it is its greatest ally"). *See generally* Everson v. Board of Education, 330 U.S. 1, 15-16 (1947) (stating that minimum protection offered by Establishment Clause is to be free from forced belief or disbelief in religion); Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1a225 (2002) (noting "the school's responsibility to ensure listeners are not coerced to affirm beliefs they do not share" under Establishment Clause).

211 *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring) (noting that in educational settings "the line between voluntary and coerced participation may be difficult to draw); Illinois ex. rel. McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (commenting that school is most important forum to exclude religion). *See generally* Lee v. Weisman, 505 U.S. 577, 581-99 (1992) (discussing Coercion test).

212 Good News Club v. Milford, 533 U.S. 98, 131-33 (2001) (Stevens, J., dissenting); Charles Levendosky, *Good News Club's Win at High Court Bad News*, FIRST AMENDMENT CYBER-TRIBUNE, *available at* http://w3.trib.com/FACT/1st.lev.sctongoodnewsclub.html (June 17, 2001) (stating "[r]eligious worship is easily distinguishable from teaching morals from a religious perspective").

213 127 F.3d 207 (2d Cir. 1997).

214 The District apparently has been prepared to allow the use of its premises for the discussion of religious material in a secular setting and to allow the

This court and other lower courts have drawn this distinction to allow community groups to use public facilities for the discussion of religious topics but not to allow them to use public schools for religious worship.[215]

The majority's analysis relies heavily on *Lamb's Chapel*.[216] However, it is suggested, the Court failed to make a critical comparison between the activities at issue in *Lamb's Chapel* and those at issue in *Good News*. If the Court had done so, it would have seen that the activities at issue in *Good News* were geared more towards religious recruitment and worship than religious viewpoint. The activity challenged in *Lamb's Chapel* was the showing of a film series.[217] This activity required a very passive role of those participating.[218] It seems that those viewing the video were free to leave and enter as they please.[219] Those watching the video were not all members of any one organization; they were not compelled to pledge their devotion to Christianity while participating.[220] Those participating were only required to

> discussion of secular matters from a religious viewpoint. . .The distinction between these uses on the one hand, and religious services and instruction on the other, is not difficult for school authorities to make.

Id. at 215.

[215] The distinction, between prohibiting religious services and prohibiting religious expression from a religious viewpoint, is no more conceptually difficult than the distinction between prohibiting picketing and prohibiting all picketing except that which bears on a labor dispute. A religious service is an activity, a manner of communicating which carries a very special and distinct meaning in our culture. While a service may express a religious viewpoint, for example, a Catholic mass featuring a prayer for the welfare of the unborn and for the reform of American abortion law, the distinction is between medium and message.

Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937, 943 (5th Cir. 2000); Deboer v. Village of Oak Park, 86 F. Supp. 2d 804, 810-11 (N.D. Ill. 1999) (asserting "[p]rayer and prayer services are distinctly different in nature from other forms of expression, not just because of the manner in which – or the viewpoint *from* which – the speaker's thoughts are expressed, but also in the substance of the expression"). *See generally* Martha P. McCarthy, *Good News Club v. Milford Central School: Cracks in Wall Between Church & State*, EDUCATION UPDATE ONLINE (July 2001), *available at* http://www.educationupdate.com/july01/htmls/law-goodnews.html (opining under *Good News* ruling, once public school establishes a limited public forum it cannot exclude religious groups, even if their meetings are intend to proselytize students).

[216] *See Good News*, 533 U.S. at 106-10 (noting *Lamb's Chapel* is one of two prior opinions guiding the Court's current analysis).

[217] *Lamb's Chapel*, 508 U.S. at 387.

[218] *See id.* at 387-88 (discussing the Church's request to display the film series); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 383-84 (2d Cir. 1992) (noting the Church's requested use of the school was to allow the community to view the film series free of charge).

[219] *See Lamb's Chapel*, 508 U.S. at 387-88.

[220] *See* McCarthy, *supra* note 102, at 26 (opining "it can be argued that the controversial film series in *Lamb's Chapel* entailed primarily the expression of religious

sit back and watch. Significant also, is that the requested time to display the film series was in the evening; 7 p.m. to 10 p.m.[221] Students could not perceive the display of the film series as inclusive in the school curriculum.

In *Good News*, the activity required much more active involvement from those participating. Students were expected to contribute by memorizing bible verses and singing songs.[222] The students also played games and received prizes during this time.[223] The students were asked to pledge their devotion to Christianity.[224] The non-Christian child in the school gets ready to leave school at the end of the day as he watches his friends run to what appears to be playtime.[225] This one child will feel left out of the fun. The majority concluded that the young age of the children would not lead to any requirement for special protection under the Establishment Clause.[226] Apparently the six Justices of the majority have forgotten what it was like to be young – when being left out of the group was the worst thing that could happen in the world.

Another notable distinction between *Lamb's Chapel* and *Good News* is the audience to which the challenged activity is directed. The videos in *Lamb's Chapel* were intended to appeal to both the

perspectives on secular subjects, whereas the club meetings involve more religious instruction and worship"). *Compare id.* at 395 (highlighting the film series was not limited to Church members., rather the entire community was welcome to attend), *with Good News,* 202 F.3d at 505, n.4 (discussing lesson plan of Good News Club which distinguishes between the "saved" children who have "believed on the Lord Jesus as [their] Savior" and the "unsaved" children, who are further encouraged "to accept Jesus Christ as their savior").

221 *Lamb's Chapel*, 959 F.2d at 384.

222 *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

223 *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 506 (2d Cir. 2000).

224 *See id.* at 505 (distinguishing treatment of the "saved" versus the "unsaved" students).

225 *See* Karlinsky, *supra* note 208 (questioning the Court's reasoning that young children are not at risk of perceiving a state endorsement of religion because they will be able to distinguish between what they learn before and after the school bell rings). *See generally* Board of Education of Community School v. Mergens, 496 U.S. 226, 247 (1990) (conceding students may feel religious pressure if a religious club were allowed to operate on school grounds); Kathleen Dolegowski, *Religious Club Files Suit After School Denies Access to Property*, LAWYERS JOURNAL, August 10, 2001 (discussing the Court's reasoning that children would not feel pressure to attend the after school program).

226 [W]hatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

Good News, 533 U.S. at 115.

current students and also other members of the community; this is evidenced by the fact that one video, dealing with the effects of governmental interference, abortion, and pornography, was not recommended for young audiences.[227] However, the challenged activity in *Good News* was intended only for young children.[228] A member of the community could see this as a government endorsement of religion because only students are targeted.

Nonetheless, the Court in *Good News* did not critically address the distinction between religious viewpoint and religious worship.[229] It remains unclear whether an organization conducting religious worship in a public forum would lead to an Establishment Clause violation.[230] It appears that under this ruling, a public school that opens itself for community use cannot bar religious groups, even if the purpose of using the school is to recruit students for membership.[231]

[227] *See Lamb's Chapel*, 508 U.S. 384, 389, n.3 (1983) (discussing video number 4, "The Family Under Fire," which contained the following warning "*Note: This film contains explicit information regarding the pornography industry. Not recommended for young audiences.*"); *Lamb's Chapel*, 959 F.2d at 383-84 (discussing repeatedly that the Church intended the film series to be open to the entire community).

[228] *See Good News*, 533 U.S. at 103 (noting the Club is intended for children ages 6 to 12); McCarthy, *supra* note 102, at 26 (distinguishing the target audience in *Lamb's Chapel* from that in *Good News*).

[229] Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development.'" In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced of any teaching of moral values.

Good News, 533 U.S. at 112, n.4 (citations omitted). *See* Levendosky, *supra* note 212, (arguing the majority improperly focused on viewpoint when it should have been concerned with the content of the speech); *see also* Eugene R. Barnosky, *Outside Counsel: 'Good News' May be Bad News for School Officials*, N.Y.L.J., Aug. 20, 2001 (commenting tension remains between the free speech rights of these religious organizations and the Establishment Clause concerns of school officials, and opining litigation may ensue because the *Good News* decision blurred "[t]he thin line between the activity of teaching values to children from a Christian perspective and the repetition of biblical verses").

[230] *See* Barnosky, *supra* note 229 (discussing argument of some religious advocates that "the strong language of the majority may make it difficult to deny any religious activity, including mass or other Sabbath services, if a district opens has opened its forum to secular users who conduct discourse on moral issues"); *see also Speech or Worship?; The High Court Blurs the Line in a School Case,* PITTSBURGH POST GAZETTE, June 15, 2001, at A16 (posing question, "[m]ust public schools that offer their facilities for community forums also agree to play host to religious services – not just an evangelical Protestant prayer meeting but Jewish Seder or a Catholic High Mass?"). *See generally* David C. Slade, *Christian Clubs in Public Schools; Brief Article*, WORLD & I, Sept. 1, 2001 at 54 (commenting the distinction between viewpoint and proselytizing is going to became the focus of public debate).

[231] *See Good News,* 533 U.S. at 131-32 (Stevens, J., dissenting) (distinguishing religious recruitment/proselytizing from the mere discussion of topics from a religious viewpoint); McCarthy, *supra* note 215 (criticizing Court's eradication of "the distinction

Children must be protected from efforts to proselytize.[232] The students are of a very young age; easily impressionable. Even if the parents of these students did not consider this activity to be endorsement by the school district, the parents should not be our only concern. The students are the ones immersed in the environment; an environment in which they are required to take part unless their parents are willing and able to tender the money for a private school education. One commentator has suggested that the Supreme Court has replaced the "wall of separation" with a "school bell of separation."[233] The timing of the activities, just moments after the end of instruction, could give the impression to young children that this is part of the school day.[234]

Supporters of the *Good News* decision cite to the *Board of*

between religious viewpoints and worship that some lower courts had drawn").

232 *See* Press Release, *ADL Says Supreme Court Decision is a Setback for Church-State Separation,* ANTI-DEFAMATION LEAGUE, *available at* http://www.adl.org./PresRele/rel_chstsep_90/3859_90.asp (June 11, 2001) (quoting Abraham H. Foxman, Anti-Defamation League National Director; "[c]hildren must be protected from efforts to proselytize in the schools, and this ruling substantially limits such protection"). *See generally* Karlinsky, *supra* note 208 (opining the *Good News* decision extinguishes the Establishment Clause rights of children; rights which should protect the child from the recruitment efforts of religious organizations while at school). *But see* John F. Dunsford, *A Closer Look at Good News v. Milford: What are the Implications (Stay Tuned),* 25 SEATTLE U.L. REV. 577, 607 (2002) (suggesting Good News' implications on the Establishment Clause debate are narrow).

233 Sammie Moshenberg, *Top-Court Decision Fuels Efforts to 'Christianize' Kids,* JEWISH BULLETIN OF NORTHERN CALIFORNIA, *available at* http://www.jewishsf.com/bk010622/comm1.shtml (last visited March 7, 2003) (opining the *Good News* decision replaces the "wall of separation" with a "school bell of separation;" there is no true separation when official classroom instruction and "explicit religious proselytizing" are separated by mere minutes).

234 *See Good News,* 533 U.S. at 144-45 (Souter, J., dissenting) ("there is a good case that Good News's exercises blur the line between public classroom instruction and private religions indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not"); Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 265-67 (1990) (Marshall, J. concurring in judgment) (commenting that religious clubs at school will convey the erroneous message that the school is endorsing, rather than tolerating, student worship); *see also* Press Release, *Civil Rights Group Decries High Court's Ruling on Religious Groups in Public Schools,* PEOPLE FOR THE AMERICAN WAY, *available at* http://www.pfaw.org/pfaw/general/default.aspx?oid+1676 (June 11, 2001) (opining there is a risk that students will perceive school endorsement of Christianity when the Club is allowed to hold a meeting immediately after the end of the school day); Press Release, *National School Boards Association Disappointed in High Court's Decision to Give Religious Clubs Access to Public Schools,* NATIONAL SCHOOL BOARDS ASSOCIATION, *available at* http://www.nsba.org/site/doc.asp?TrackID=&SID=1&DID=5500&CID=225&VID=2 (June 11, 2001), (stating National School Boards Association is "very concerned now about the ability of school board members to prevent confusion among students about the academic education taking place during school hours and the worship services right afterwards").

Education v. Mergens[235] upholding the Equal Access Act.[236] What is distinct about the Equal Access Act is that it applies to only public *secondary* schools.[237] Milford argued "that Congress had recognized the vulnerability of elementary school children to misperceiving endorsement of religion."[238] The Court rejected this argument; "The Act, however, makes no express recognition of the impressionability of elementary school children. It applies only to public secondary schools and makes no mention of elementary schools. We can derive no meaning from the choice by Congress not to address elementary schools."[239]

Though the Court rejects the view that Congress has recognized the vulnerability of young children, Mergens is still inapplicable to our analysis of *Good News*. The *Mergens* Court found that the Equal Access Act protects religious *speech*; even stating that it satisfied the secular prong of the *Lemon* Test.[240] This note finds that the Court in *Good News* failed to observe the distinction between religious speech and religious worship. As noted in *Bronx Household*, it is not difficult to make the distinction between the discussion of secular subjects from a religious viewpoint and religious services.[241] It appears evident

235 496 U.S. 226 (1990).

236 *See* Craig, *supra* note 41, at 557 (asserting no argument exists which justifies the exclusion of elementary schools from coverage under the Equal Access Act); *see also* Davis, *supra* note 10, at 234 n.62 (noting the original draft of the Equal Access Act would have encompassed elementary schools). *See generally* Leah Gallant Morgenstein, *Note: Board of Education of Westside Community Schools v. Mergens: Three "R's"+ Religion = Mergens*, 41 AM. U. L. REV. 221, 240 n.98 (1991) (discussing Tenth Circuit's holding enjoining religious groups from meeting at public elementary school).

237 *See* 20 U.S.C.S. §4071(a); *see also Board of Education of Westside Community Schools*, 496 U.S. at 241 (noting Equal Access Act only applies to public secondary schools receiving federal financial assistance). *See generally* Philip C. Kissam, *Essay: Let's Bring Religion into the Public Schools and Respect the Religion Clauses*, 49 KAN. L. REV. 593, 624 (2001) (commenting Equal Access Act establishes a limited open forum for non-curriculum related groups in public secondary schools receiving federal financial assistance).

238 *See Good News*, 533 U.S. at 118, n.8.

239 *Id.*

240 *Mergens,* 496 U.S. at 248 (finding "the Act's prohibition of discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test"); 20 U.S.C.S. §4071(a) (declaring unlawful a school's discrimination on the basis of religious, political, philosophical, or other content of speech).

241 *Bronx Household,* 127 F.3d at 215 (asserting it is not difficult for school officials to make the distinction between the discussion of secular subjects with a religious viewpoint and religious services). *See generally* Roemer v. Board of Public Works, 426 U.S. 736, 759 n.21 (1976) (quoting from Tilton v. Richardson, 403 U.S. 672 (1971)) ("evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education"). *But see* Barry W. Ashe,

that if one is required to memorize bible verses, join in prayer, and asked to pledge devotion to Christianity while participating in an organization's meeting, the activity can no longer be considered mere discussion from a religious viewpoint. It appears the only factor that differentiates this activity from a Sunday-School lesson in the local church is the actual church itself; this is religious worship. As religious worship, the activity cannot seek the protection of the Equal Access Act as upheld in *Mergens*.

What is most disappointing about this decision is that the Supreme Court is viewing the Establishment Clause as a threat to the religious freedom of organizations such as the Good News Club.[242] The Clause prevents any one religion from being disfavored because the government has chosen to endorse another.[243] To oppose religious worship in schools is not to be hostile to all things religious.[244] There is a difference between religious viewpoint and religious worship.

By protecting the right to speak with a religious viewpoint in public forums, we allow for the dissemination of various ideas throughout our society.[245] However, it is important to realize that

Fifth Circuit Symposium: Constitutional Law: The Fifth Circuit's War Against Religion in the Public Square, 46 LOY. L. REV. 973, 1025 (2000) (noting some commentators felt the 2nd Circuit's decision in *Bronx Household* strayed from the Court's line of precedent since *Widmar*).

242 *See generally* Karlinsky, *supra* note 208 (opining "the Establishment Clause is not a barrier to religion"); Rezai,, *supra* note 41, at 510 n.35 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)) (commenting the Establishment Clause was meant to place freedom of religion out of majority control).

243 *But see* Cheryl Saunders, *Religion and Constitutional Rights: Comment: Religion and the State*, 21 CARDOZO L. REV. 1295, 1300-01 (2000) (suggesting separation of religion and state might not solve the problem of religious persecution in a multicultural community). *See generally* Marsh v. Chambers, 463 U.S. 783, 821-22 (1983) (arguing separation of religion and state does not rob the nation of its spiritual identity); Karlinsky, *supra* note 208 (explaining separation of religion and state "ensures that America's religious institutions are healthy, vital and the strongest worldwide").

244 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting) (stating majority opinion "bristles with hostility to all things religious in public life" and is contrary to the spirit of the Establishment Clause); *see also* Karlinsky, *supra* note 208 (clarifying "[t]o oppose those who would increase the role of religion in government is not to be irreligious... Instead, it is a recognition that the Establishment Clause has been a key to the success of religion in America."). *But see* Gilbert A. Holmes, *Article: Student Religious Expression in School: Is it Religion or Speech, and Does it Matter*, 49 U. MIAMI. L. REV. 377, 409-10 (1994) (suggesting prohibition of religious expression in schools by the state may appear as state opposition to religion).

245 *See* Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 122 S.Ct. 2080, 2087 (2002) (commenting freedom of religion within the public forum has been historically important for the dissemination of ideas). *See generally* Marsh v. Alabama, 326 U.S. 501, 502-05 (1946) (finding a town may not restrict religious speech in public,

the state is not discriminating against religion by declining to allow religious worship on its property.[246] We are free in this country to practice whatever religion we choose, but when worship enters a public forum we lose a certain portion of that freedom because the independence of our decision is now tainted with social pressure to participate.[247] Justice O'Connor has recognized that allowing religious worship in the public forum would inevitably allow for benefits to a few religions and the possible creation of political alliances along religious lines.[248] Worst of all, she notes, it could interfere with the independence of religious institutions because of unneeded entanglement with the state.[249] Keeping worship out of our public lives ensures the vitality of all religions in this country.[250]

even if the town be company-owned, because restriction would curtail the dissemination of ideas); Largent v. Texas, 318 U.S. 418, 422 (1943) (stating restriction upon the right to disseminate ideas to the public abridges the freedom of religion).

246 *See* Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123, 1128 (1995) (commenting "school prayer proponents still adhere to the long rejected notion that denying a governmental role in religious worship amounts to hostility to religion"). *See generally* Karlinsky, supra note 208 (describing the Establishment Clause as religion's "greatest ally").

247 *See Lee,* 505 U.S. at 587 (opining "[t]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"); *Lynch,* 465 U.S. at 687-88 (expressing concern about message endorsement sends to nonadherents); *see also Watchtower Bible & Tract Society of New York, Inc.*, 122 S.Ct. at 2094-96 (Rehnquist, C.J. dissenting) (comparing the freedom of religious speech in a public forum and on personal private property). *See generally* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 144 (1981) (Marshall, J. dissenting) (noting freedom of speech can be curtailed by a town if the speech has a religious character).

248 *See Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (commenting "excessive entanglement with religious institutions... [may] give the institutions access to government or governmental powers not fully shared by nonadherents of religion, and foster the creation of political constituencies defined along religious line"); *see, e.g.* Larkin v. Grendel's Den, Inc. 459 U.S. 116, 126 (1982) (explaining purpose of Establishment clause is to ensure separation of church and state); Abington Sch. Dist. v. Schempp 374 U.S. 203, 208 (1963) (stating separation of church and state is necessary).

249 *See Lynch*, 465 U.S. at 688 (opining "excessive entanglement with religious institutions... may interfere with the independence of the institutions"). *See generally Larkin*, 459 U.S. at 127 (stating statutes which entangle church and state are highly offensive to the constitution); Abington Sch. Dist. v. Schempp 374 U.S. 203, 207 (1963) (arguing Constitution requires free exercise of religion).

250 *See* Karlinsky, *supra* note 208 ("By protecting religion from the state and state from religion, and by making sure that they do not mix either in a school room or where social services are delivered, the Establishment Clause ensures that America's religious institutions are healthy, vital and the strongest worldwide. The Establishment Clause has been a key factor in ensuring that religion in this country thrives"). *See generally* Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating "[t]he Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

The Good News Court's analysis of the Endorsement and Coercion tests.

The Endorsement Test.

While briefly acknowledging the Endorsement test, the Court strikes it down as applied to *Good News*.[251] The Court lays out certain facts as support: students are not allowed to linger in the building at the end of the day,[252] young children are aware of which events require permission from a parent,[253] the meetings are not held in an elementary school classroom,[254] the instructors are not schoolteachers,[255] and the children attending a Club meeting are of varying ages, which is a departure from the normal classroom setting.[256] For all these reasons, the Court finds no support for the argument that young children would perceive endorsement.[257]

A flaw with the Court's first argument, that no children are allowed to loiter after school, is that it disregards the fact that these meetings are taking place immediately at the end of the school day.[258] A student who is still gathering his/her belongings could observe what is occurring in the classroom. The court also

251 *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 117-19 (2001). *See generally* Bauchman for Bauchman v. West High School 132 F.3d 542, 552 (10th Cir. 1997) (stating the endorsement test is now generally accepted as the leading framework for analyzing Establishment Clause claims); James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 674-677 (1990) (suggesting that even among Justices on the Court who have adopted the endorsement test, there is no unanimity on how it should be applied).

252 *Good News*, 533 U.S. at 117 (stating facts to support Court's opinion that students will not perceive endorsement).

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

258 *See Civil Rights Group Decries High Court's Ruling on Religious Groups in Public Schools*, *supra* note 246 (arguing students may perceive endorsement due to the timing of the activity); *see also* Moshenberg, *supra* note 233 (opining no true separation exists when the religious activity is beginning only minutes after official school activities end). *See generally* Levendosky, *supra* note 212 (noting Club's position that only students with written permission of their parents may participate, but questioning that position because the Club requested use of the school to take advantage of the fact that their meeting could have continuity with the school day).

does not address the likelihood that other after school activities could be taking place, for which other students would remain present in the building to attend.

Does the fact that the meeting occurred in a classroom used by middle and high school students really change the message the activity sends to the younger students? All of these students attend classes in this building – the location of the particular classroom will not change the perception of the younger students. What will have a stronger influence on the students is that their fellow classmates are attending this meeting.

The Court's focus on the permission slips is bewildering. The Court's rationale is that an elementary school student would not perceive endorsement of the activity because it is required to receive the permission of the parents to attend the activity.[259] Can one then conclude that the school district is not supporting the other various activities for which permission slips are required? When the class takes a trip to the zoo, is the school not supportive of the educational message of that trip. The permission slips could be considered evidence that the school is not attempting to coerce the students into attending the Club's meetings, but the use of permission slips does not prevent the risk students will perceive an endorsement of religion.

The Court directed little effort to applying the Endorsement test, and thus failed to apply it properly. The Court failed to take a serious look at the objective message the activity sends to the students in the school, instead it used five facts to support its pre-determined conclusion that no student would perceive endorsement.[260] It appears that Justice O'Connor has become willing to accept a weak Endorsement test analysis rather than

259 *See Good News*, 533 U.S. at 117-18 (asserting "[s]urely even young children are aware of events for which their parents must sign permission forms"); *see also* Brown, *supra* note 14, at 278 (observing the Court's misplaced emphasis on the permission slip requirement in its Establishment Clause analysis is due to the Court's focus on the parents' perceptions instead of the students.' "After determining the parents as the relevant community, the Court cites [Lee v. Weisman] in support of its finding that it is these same parents and their perceptions and sense of coercion that is relevant, not their children's perceptions. The holding in Lee is contrary to this finding."). *See generally id.* at 280-82 (stating that in finding the permission slip dispositive, the Court in *Good News* ignored the likely possibility that many parents will fail to read the permission slips that their children give them and choose to simply sign them. When this happens, the children may not have any guidance or explanation about religious clubs such as Good News).

260 *See Good News* 533 U.S. at 117-18.

none at all.[261]

The Court's use of the Endorsement test also reveals a shortcoming in the test. O'Connor's test supplies little guidance on how to define the relevant community.[262] By giving little direction, O'Connor allows the test to be manipulated by the Court as a means to reach desired ends. The Court's arguments appear as if the Court views the relevant community to be the school itself. Should we only be concerned with how the *students* objectively perceive the challenged activity? The factors the Court uses to determine that students would not perceive endorsement are inapplicable when considering the viewpoint of the parents.[263] It is insignificant to the parents that the instructors are not schoolteachers or that the meetings are held in a classroom where their child does not receive instruction. The Club is attempting to proselytize students into following the Club's religious beliefs through meetings that are held immediately after the end of the school day.[264] The parents could believe that the school, by hosting such activity, is endorsing the efforts of the Club and further, that the school is favoring those students who do participate.[265] The use of permission slips is not

261 *See Good News*, 533 U.S. at 117 (applying Endorsement test to *Good News*). *See generally* Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 338 (1994) (agreeing Justice O'Connor's endorsement test raises problems of perspective); Lewis & Vild, *supra* note 251 (stating although still the law, the endorsement analysis is plagued with the problem of perspective – from whose perspective should the endorsement analysis be applied: an objective perspective, subjective, or a reasonable person's?).

262 *See* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment) (declaring "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appear").

263 *See supra* text accompanying notes 252-57.

264 *Good News Club*, 533 U.S. at 144 (Souter, J., dissenting) (observing the Club actually requested access to the school at 2:30 p.m. in order to begin the religious instruction promptly at 3 p.m. and stating "the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school"); *see also* Karlinsky, *supra* note 208 (arguing it is difficult to determine when the school day ends and the Good News meeting begins). *See generally* Bradley Sanders, *Constitutional Law—First Amendment—Speech Discussing Otherwise Permissible Subjects Cannot Be Excluded From a Limited Public Forum on the Ground that the Subject is Discussed From a Religious Point of View*, 71 MISS. L.J. 305, 323 (2001) (arguing the recent First Amendment Court decisions now place upon schools the hopeless task of distinguishing between organizations that teach secular subjects from a religious viewpoint from distinctly religious organizations).

265 *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").

sufficient to thwart this message of endorsement.[266]

The Coercion Test

The majority in *Good News* addressed Justice Kennedy's test, asking, "whether the community would feel coercive pressure to engage in the Club's activities."[267] The Court stated that the relevant community is the parents, not the students.[268] Due to the use of permission slips, the parents made the choice of whether their children will attend Club meetings.[269] "Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities."[270]

There are two flaws within the Court's reasoning. The first is the idea that the students cannot be coerced in this situation because of the use of permission slips. The use of permission slips is evidence to support that the school is not trying to coerce the students, but it is not dispositive. It seems odd that the child must actually join before that child is considered to have been coerced. Isn't it possible to be coercing someone to do something before they actually do it? A child can have felt the pressure of coercion without actually having joined the Club.

The second flaw with the Court's reasoning is that it designated the parents as the relevant community. The coercion test does not necessitate the Court select a relevant community; the test, as originally laid out, focused on the students and is to be applied only to the students.[271] "The inquiry with respect to

266 *See* Karlinsky, *supra* note 208 (commenting use of permission slips is necessary, but it is not enough to "purge the taint" of what is otherwise a clear Establishment Clause violation); *see also* Bronx Household of Faith v. Bd. Of Education of NY, 226 F. Supp. 2d 401, 425 (2002) (showing parental consent was but one element used to see if the Establishment Clause was violated); *see cf. Anderson v. Mexican Academy and Central School*, 186 F. Supp. 2d 193, 208 (2002) (explaining the court must look at other factors aside from parental consent).

267 *Good News*, 533 U.S. at 115.

268 *Id.*

269 *Id.*

270 *Id.*

271 *See* Lee v. Weisman, 505 U.S. 577, 590 (1992) (focusing the attention of the analysis on the position of the students, both those who participated in the prayer, and the student who did not); *see also Mergens*, 496 U.S. at 260-61 (Kennedy, J., concurring) (concluding the Equal Access Act is consistent with the standard of coercion because it does not authorize school authorities to require or encourage students to become members of the religious club or to attend club meetings); *see cf.* Chaudhuri v. Tennessee, 886 F. Supp. 1374, 1383 (1995) (showing coercion exists when one is forced to participate in a religious activity).

coercion must be whether the government imposes pressure upon a student to participate in a religious activity."[272] The parents would not feel pressure to join the Club because they are not attending the school. The Club is holding its meetings in the school community, and the students are going to feel the effects of any pressure to take place in religious activities. It appears the Court used the parents as the relevant community because it is easier to argue that no coercion exists when considered from the viewpoint of the parents. The parents are removed from the school itself; it is logical to conclude little coercion will be felt. The Court's application of the parents as the relevant community contradicts its analysis under the Endorsement test, where the Court indicated the students were the relevant community. It appears the Court is using whichever community will lead to the desired end. This factor serves as additional evidence that the Establishment Clause analysis of this case is illusory.

The Court in *Good News* gave little effort to discussing the Coercion test, similar to the treatment the Endorsement test received. If the Court continues to reject existing Establishment Clause tests, the question must be asked; how do we determine if an Establishment Clause violation has occurred? The *Lemon* test remains applicable law, but it is questionable how much longer it will survive because of the criticism of its utility.[273] Soon, there will be no tests to apply. Once the challenged speech survives Free Speech analysis, it will be constitutional. It appears that the Court is leading towards turning the Establishment Clause into a nullity when involving religious speech.

V. COULD THE COURT'S DECISION ACTUALLY INJURE ORGANIZATIONS SUCH AS GOOD NEWS MORE THAN IT HAS HELPED?

Current Milford Superintendent Peter Livshin has commented that three options remain for the District; "1. allow the Good News Club, and all clubs, to use school facilities right after

272 *Mergens,* 496 U.S. at 261 (Kennedy, J., concurring) (noting "[t]his inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw"). *See generally* Chaudhuri, 886 F. Supp. at 83 (asserting a plaintiff must show they were coerced into participating in a religious activity); Tanford v. Brand, 883 F. Supp. 1231, 1239 (1995) (explaining how real the pressure students feel is).

273 *See supra* notes 54-57 and accompanying text.

school; 2. bar all clubs from meeting at school facilities; or 3. allow clubs only after a certain time such as 5 o'clock."[274] In Orange County, California, the Saddleback Valley United School District opted for option number two – choosing to ban all student groups from campus rather than admit the Fellowship of Christian Athletes student group.[275] How many school districts will follow lead? School officials may be reluctant to release control over what the students hear on the property after the school day ends, opting to refuse any after-school activity rather than appearing to foster proselytizing among young students.[276] This appears to have an effect opposite of that intended by the six justices in the majority. The Court may learn "that while *Good News* may make good law, it does not necessarily make good policy when attempting to manage a limited public forum."[277]

Since the *Good News* decision, an additional concern has

[274] Heather Koerner, *Good News, Indeed*, CITIZEN MAGAZINE (2001), *available at* http://www.family.org/cforum/citizenmag/features/a0017343.html (commenting Livshin hopes the school board will choose option number three, so the Club can only meet when children have left the school after completion of the day's instruction); *see* Richard W. Garnett, *Article: The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1298 (2002) (explaining an affect of more options); *see also* Richard W. Garnett, *A Quiet Faith? Taxes, Politics and The Privatization of Religion*, 42 BOSTON COLLEGE L. REV. 771, 790 (2001) (commenting on the usage of school facilities).

[275] *See* John C. Eastman, *Bad New for Good News Clubs?*, ASHBROOK CENTER FOR PUBLIC AFFAIRS (July 2001), *available at* http://www.ashbrook.org/publicat/oped/eastman/01/goodnews.html. (opining the *Good News* decision is bad news for all student organizations); John H. Garvey, *Symposium: A Religious Equality Amendment?: All Things Being Equal. . .*, 1196 BYU L. REV. 587, 591 (1996) (showing decision's affect on numerous issues); *see cf.* Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 132 (2000) (opining that allowing one group to use the facilities will affect a decision to allow other groups use of the facility in the future).

[276] *See Speech or Worship?; The High Court Blurs the Line in a School Case, supra* note 230 (stating the *Good News* ruling "could have the ironic effect of curbing free speech, by persuading school officials to close their facilities to any after-hours forums rather than risk the divisiveness of seeming to foster proselytizing among very young children"); *see also* Koerner, *supra* note 274 (discussing Milford Superintendent Livshin's preference to only allow clubs to meet only after a certain time so that children are clear that the activity is not part of the school curriculum). *See generally* Sundwall, *supra* note 12, at 188 (suggesting the Good News decision may actually harm religion because school districts may eliminate all clubs from meeting on their grounds in order prevent religious groups from having access).

[277] James & O'Dell, *supra* note 208, at C10 (arguing further, "[t]he coordination and monitoring necessary for the initial authorization and ongoing compliance of expressive groups may contend with the underlying educational mission"). *See generally Anderson*, 186 F. Supp. 2d at 204 (explaining limited public forums); Allison, *supra* note 164, at 114 (explaining the Supreme Court will never accept an Establishment Clause justification for excluding a religious speaker from a limited public forum).

surfaced: Does every club in creation have right to access to public schools?[278] Milford Superintendent Livshin asked "Do I have the right to deny a local chapter of the Ku Klux Klan or the Wiccans from using the school?"[279] Superintendent Livshin raises a very important concern; does this ruling require school officials to give equal access rights to religious groups who base their religions in hate?[280] The neutrality principle that is the foundation of the modern day approach to the Establishment Clause makes it impossible for school officials to make these distinctions.[281]

VI. CONCLUSION

The Court in *Good News* correctly decided the case on pure Free Speech grounds, however the Establishment Clause analysis is merely an afterthought. The Court's decisions dealing with religious activities in public education have led to the point where the Court gives little concern to the issue of Establishment. Soon the Establishment Clause will cease to play any role in public education. Lower court decisions, prior to *Good News*, made the determination of whether the challenged activity violated the Establishment Clause based on the distinction between religious viewpoint and religious worship. The Court in *Good News* failed to critically address this distinction, and as a

278 *See* Eastman, *supra* note 275 (arguing a multitude of other organizations will seek access to the school's facilities claiming their meetings serve a benefit to the community). *See generally* Autumn Fox & Stephen R. McAllister, *Article: An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 236 (1997) (explaining what permitted usage is); Smith, *supra* note 173, at 471 (explaining usage must be nonexclusive and open to the general public).

279 Koerner, *supra* note 274.

280 It is certainly unclear as to whether a district has a right to limit hateful religious speech or extremist rhetoric directed at the children, especially if that hateful speech originates from a theology of hatred, such as those professed by Hale's World Church of the Creator, Farrakhan's Nation of Islam or the more benign-sounding (but no less hateful) Christian Identity movement.

Karlinsky, *supra* note 208; *see* Broberg, *supra* note 29, at 99 (showing why hate groups may be permitted to meet on school campuses); *see also* Morgenstein, *supra* note 236, at 222 (commenting once an open forum is created a school may not deny access)

281 *See generally Speech or Worship?; The High Court Blurs the Line In a School Case*, *supra* note 230 (arguing school officials may choose to close facilities to all organizations rather than make this difficult distinction). *But see* Deborah M. Brown, *Notes: The States, The Schools and the Bible: The Equal Access Act and State Constitutional Law* 43 CASE W. RES. 1021, 1058 (1993) (showing student groups that are unlawful can be excluded).

result school officials are unclear about whether they can exclude religious worship from their facilities.